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No.

In the Supreme Court of the United States

COLLEEN B. WILCOX, ET AL., CROSS-PETITIONERS

v.

UNITED STATES EX REL. JOHN DAVID STONER

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes a private individual (the relator) to bring a *qui tam* civil action for treble damages and per claim penalties against "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." First enacted in 1863, the FCA's liability provision does not include a definition of the word "person." In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that States and state agencies are not "person[s]" amenable to *qui tam* suits under the FCA. Although the Court expressed "serious doubt" as to whether such suits would even be permitted under the Eleventh Amendment, it did not decide the issue, nor did it decide whether individual state officials are "person[s]" amenable to *qui tam* suits under the FCA. The questions presented are:

1. Whether the Ninth Circuit erred in holding that state officials are "person[s]" amenable to *qui tam* suits under the FCA for actions taken in their official capacities.

2. Whether the Ninth Circuit erred in holding that the Eleventh Amendment does not bar the continued prosecution of an FCA *qui tam* suit brought against state officials after the United States declines to intervene in that suit.

PARTIES TO THE PROCEEDING

Cross-petitioners Colleen Wilcox, Joe Fimiani and David Wong were defendants in the district court and appellees in the court of appeals. The Santa Clara County Office of Education and the East Side Union High School District were also defendants in the district court and appellees in the court of appeals; however, they are not cross-petitioners before this Court.

Cross-respondent John David Stoner, acting *pro se*, commenced and prosecuted this *qui tam* civil action on behalf of the United States, the State of California and Santa Clara County in the district court and before the court of appeals. The United States, the State of California and Santa Clara County all filed notices in the district court declining to intervene in the case. The United States appeared as an *amicus curiae* before the court of appeals solely on the question of whether individual state officials can be sued under the FCA.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioners Colleen Wilcox, Joe Fimiani and David Wong respectfully submit this cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 502 F.3d 1116. The opinion of the district court (App., *infra*, 23a-38a) is unreported, but is available at 2004 WL 5535992.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2007. The court of appeals denied cross-petitioners' request for en banc rehearing on November 23, 2007 (App., *infra*, 39a). On February 4, 2008, Justice Kennedy extended the time within which cross-petitioners could file a petition for a writ of certiorari to and including April 1, 2008, and on March 6, 2008, Justice Kennedy further extended the time to and including April 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh and Fourteenth Amendments to the United States Constitution and pertinent provisions of the FCA are reprinted in the appendix to this cross-petition, as are portions of the Act of March 2, 1863, ch. 67, 12 Stat. 696; the Act of April 20, 1871, ch. 22, 17 Stat. 13; and 42 U.S.C. § 1983 (App., *infra*, 41a-51a).

STATEMENT

This case provides the Court with the opportunity to resolve two important questions of federal law affecting tens of thousands of state officials throughout the United States. The Ninth Circuit below held that state officials are amenable to *qui tam* suits under the FCA for actions taken in their official capacities even if the actions in question did not result in private, pecuniary gain and even if an adverse judgment would ultimately be satisfied using funds from a state treasury. This Court's review is warranted to decide two issues left unresolved by

Stevens: (1) whether individual state officials are "person[s]" amenable to *qui tam* suits under the FCA for actions taken in their official capacities; and (2) whether, even if state officials are "person[s]" within the meaning of the FCA, principles of federalism and state sovereignty embodied by the Eleventh Amendment prohibit the continued prosecution of an FCA *qui tam* suit brought against state officials after the United States declines to intervene in that suit.

1. The FCA was enacted in response to acts of fraud that private military contractors perpetrated upon the Federal Government during the American Civil War. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863 Act); *Stevens*, 529 U.S. at 781. In its original form, the first section of the FCA provided that

> any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . . shall be deemed guilty of a criminal offence . . . .

1863 Act § 1, 12 Stat. at 696-97. Every such "person"—a term the 1863 Act did not define—could be "arrested and held for trial by a court-martial." *Id.* at 697.

The provisions of § 1 were also applied to "any person not in the military or naval forces of the United States, nor in the militia called into or actu-

ally employed in the service of the United States . . . ." § 3, 12 Stat. at 698. Such "person[s]," however, were not subject to courts-martial; instead, they could be prosecuted in federal court for criminal penalties and sued civilly for the "sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit . . . ." § 4, 12 Stat. at 698. The 1863 Act provided that a *qui tam* suit to collect these amounts could be "brought and carried on by any person, as well for himself as for the United States . . . ." *Id.* If the suit resulted in a monetary recovery, the award was divided evenly between the relator and the United States. § 6, 12 Stat. at 698.

The FCA has been amended on various occasions following its enactment in 1863.[1] However, the un-

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[1] For example, shortly after this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), Congress amended the FCA to preclude *qui tam* actions based upon information already in the Federal Government's possession; to authorize the Federal Government to take over the prosecution of *qui tam* civil suits; and to reduce the relator's share of any recovery that such actions produced. *See* Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. In 1982, Congress recodified the FCA and amended its civil liability provision, replacing the phrase "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States," with the phrase "[a] person not a member of an armed force of the United States." Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 877, 978 (codified at 31 U.S.C. § 3729 (Supp. III 1983)). The current language of the FCA is the product of amendments enacted in 1986. *See* False Claims

(continued)

defined term "person" has remained in the FCA's liability provision unchanged and undefined. *Stevens*, 529 U.S. at 783 n.12; *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003).

In its current form, the FCA provides the Federal Government with a cause of action against "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). No proof of specific intent to defraud is required, as the term "knowingly" includes a person who, with respect to information, "acts in deliberate ignorance" or "in reckless disregard" of the "truth or falsity of the information." § 3729(b).

Like its 1863 predecessor, an action under the current version of the FCA can be initiated either directly by the Federal Government or by a private *qui tam* relator who sues not only "for the person," but also for the "United States Government." § 3730(b)(1). If the action is commenced by a relator, the complaint must be filed under seal and served on the Federal Government, along with a written disclosure of substantially all material evidence and information in the relator's possession. § 3730(b)(2). The Federal Government has 60 days to review the complaint and to determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* For good cause shown, the Federal Government may move the court for extensions of

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Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified in scattered sections of 31 U.S.C.).

time during which the complaint remains under seal. § 3730(b)(3). Such extensions are routinely requested and granted. *See, e.g., United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006) (noting that over eight-year period, sixteen requests to extend the seal period were granted).

If the Federal Government declines to intervene, the relator retains the right to pursue the action. 31 U.S.C. § 3730(c)(3). A defendant found liable under the current version of the FCA is subject to civil penalties as great as $11,000 per claim, as well as treble damages and attorneys' fees. § 3729(a).[2] The relator is entitled to share in any recovery with the Federal Government. If the Federal Government does not intervene, the relator receives a bounty of between 25 and 30 percent of the recovery. § 3730(d)(2). If the Federal Government intervenes, the relator's bounty is reduced to between 15 and 25 percent. § 3730(d)(1).

2. Cross-respondent John David Stoner is a former employee of the Santa Clara County Office of Education (SCCOE). App., *infra*, 55a (Compl. ¶ 12).[3]

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[2] On its face, the FCA provides for a minimum penalty of $5,000 and a maximum penalty of $10,000 per claim. 31 U.S.C. § 3729(a). In 1999, these amounts were adjusted upward to a minimum penalty of $5,500 and a maximum penalty of $11,000 per claim, pursuant to a statutory mandate applicable to civil penalties enforced by all federal agencies. *See* Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47,099, 47,104 (Aug. 30, 1999) (codified at 28 C.F.R. § 85.3(a)(9)) (implementing the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890).

[3] Because Mr. Stoner's case was decided at the motion-to-dismiss stage, cross-petitioners refer only to those factual (continued)

During the approximate year-and-a-half he was employed by SCCOE, Mr. Stoner served as an intern with the title "Teacher of Students with Severe Disabilities." *Id.*

Shortly after his employment ended, Mr. Stoner commenced this *qui tam* civil action in the United States District Court for the Northern District of California, naming as defendants SCCOE, the East Side Union High School District (ESUHSD) and cross-petitioners Colleen Wilcox, Joe Fimiani and David Wong. *Id.* at 53a (Compl. ¶ 3). During the time period at issue in Mr. Stoner's complaint, Dr. Wilcox served as the Santa Clara County Superintendent of Schools, *id.* at 56a (Compl. ¶ 16); Mr. Fimiani served as SCCOE's Director of Special Education, *id.* at 56a (Compl. ¶ 17); and Mr. Wong served as a school principal for certain special education programs, *id.* at 57a (Compl. ¶ 19).

Mr. Stoner's *pro se* complaint did not expressly state whether cross-petitioners were being sued in their official and/or their personal capacities. Instead, Mr. Stoner's complaint alleged that ESUHSD and the "County Defendants"—a term Mr. Stoner defined as including SCCOE and cross-petitioners—presented, or caused to be presented, various false claims for payment or approval to the Federal Government. *See id.* at 53a, 94a, 96a (Compl. ¶¶ 3, 170, 177). Among other things, Mr. Stoner claimed that the defendants falsely certified compliance with all federal and state laws in order to induce the Federal

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allegations contained in Mr. Stoner's complaint. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007).

Government to disburse funds for certain special education programs. *Id.* at 94a (Compl. ¶ 170).

Mr. Stoner's complaint also contained several state-law claims, including alleged violations of the California False Claims Act (CAFCA), Cal. Gov't Code §§ 12650-12655, and common-law breach of contract. *Id.* at 99a-116a (Compl. ¶¶ 192-267). On his FCA claims alone, Mr. Stoner sought to recover millions of dollars under the FCA's treble-damages and per-claim-penalties provisions. *See, e.g., id.* at 103a (Compl. ¶ 205) (seeking "three times an amount in excess of $2,560,000 plus up to $10,000 civil penalty for each false claim").

As required by the FCA and CAFCA, Mr. Stoner filed his complaint under seal and served it on the United States, the State of California and Santa Clara County. *See* App., *infra*, 25a. Within 60 days, each of these governmental entities filed notices in the district court declining to intervene in the case. *See id.* The district court then unsealed the complaint and ordered that it be served on the defendants. *See id.* Once served, SCCOE moved to dismiss the claims against it, arguing, *inter alia*, that it was not a "person" amenable to *qui tam* suits under the FCA. *See id.* ESUHSD and cross-petitioners joined in that motion. *Id.*

3. The district court granted the motion to dismiss. *Id.* at 24a. In finding that Mr. Stoner's complaint failed to state a claim upon which relief could be granted, the district court held that the FCA did not provide a cause of action against SCCOE and ESUHSD because each of those entities was an arm of the State of California, and thus neither entity

was a "person" subject to *qui tam* suits following this Court's decision in *Stevens*. *Id.* at 35a.

As for the claims against cross-petitioners, the district court determined that any official-capacity claims were prohibited following *Stevens* because an action against a state official in his official capacity was not a suit against the official but rather was a suit against the State itself. *Id.* at 37a (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and *United States ex rel. McVey v. Board of Regents of Univ. of Cal.*, 165 F. Supp. 2d 1052, 1058 (N.D. Cal. 2001)).

The district court also rejected Mr. Stoner's assertion that he was suing cross-petitioners in their personal capacities, explaining:

> In an effort to save his claims, Stoner attempts to characterize his FCA claims against the SCCOE employees as claims against them in their individual capacities. The Court is not convinced. The Court has reviewed the pleadings and finds Stoner offers no evidence that the employee defendants were acting outside their official capacities during the incidents in question. At oral argument, Stoner argued that the employee defendants stepped outside their official capacities because they abused their authorities. The Court concludes that such allegations do not suffice.

Id. at 37a. Acting *sua sponte*, the district court further held that Mr. Stoner could not prosecute a suit on behalf of the United States acting *pro se*. *Id.* at 28a.

Since it had dismissed all of Mr. Stoner's federal claims, the district court declined to exercise sup-

plemental jurisdiction over Mr. Stoner's state-law claims and dismissed them without prejudice. *Id.* at 38a.[4]

4. The district court's ruling was affirmed in part and reversed in part by the Ninth Circuit. App., *infra*, 3a. The only aspect of the district court's ruling with which the Ninth Circuit disagreed was that dealing with cross-petitioners' amenability to suit in their personal capacities. *Id.* at 12a.

According to the court of appeals, the district court had erred in dismissing Mr. Stoner's personal-capacity claims against cross-petitioners. The Ninth Circuit explained:

> The plain language of the FCA subjects to liability "any person" who, among other things, knowingly submits a false claim or causes such a claim to be submitted to the United States. 31 U.S.C. § 3729. Although the FCA does not define the term "person," the Supreme Court has made clear that the term includes "natural persons." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003); *see also* 1 U.S.C. § 1 (defining the term "person" for purposes of "determining the meaning of any Act of Congress" as including an

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[4] After the district court issued its ruling, Mr. Stoner filed a civil suit in the Superior Court of California for Santa Clara County in which he reasserted his state-law claims. The state trial court later granted the defendants' motion for summary judgment. *See California ex rel. Stoner v. Santa Clara County Office of Educ.*, No. 1-04-CV-022563, slip op. (Super. Ct. of Cal. Santa Clara County Feb. 27, 2007), *appeal pending*, No. H031576 (Cal. Ct. App. 6th Dist. argued Apr. 15, 2008).

> individual). Therefore, state employees sued in their personal capacities are "persons" who may be subject to liability for submitting a false claim to the United States.

Id. at 12a.

In so ruling, the Ninth Circuit recognized that its decision conflicted not only with a published district court ruling from within the Ninth Circuit (*McVey*), but with the Eighth Circuit's decision in *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001), *cert. denied sub nom. United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, 536 U.S. 925 (2002). *Id.* at 13a. The Ninth Circuit expressly disagreed with *Gaudineer* and *McVey*, believing that the "reasoning of these cases [could not] be reconciled with the plain language of the statute." *Id.*[5]

To support its disagreement with *Gaudineer* and *McVey*, the Ninth Circuit relied upon this Court's decision in *Hafer v. Melo*, 502 U.S. 21 (1991), whose reasoning the court of appeals found to be "equally applicable to [its] interpretation of the FCA." *Id.* at 14a. In *Hafer*, this Court held that private persons can sue state officials in their personal capacities

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[5] Although it did not discuss the ruling in detail, the Ninth Circuit also cited with approval a district court ruling from within the Tenth Circuit that had allowed an FCA *qui tam* suit to proceed against individual state officials. App., *infra*, 14a (citing *United States ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp. 2d 1209 (D.N.M. 2004), *appeal pending sub nom. United States ex rel. Burlbaw v. Orenduff*, No. 06-2006 (10th Cir. argued Mar. 5, 2007)).

under 42 U.S.C. § 1983, which provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." *See* 502 U.S. at 27-31. The United States, which appeared before the Ninth Circuit solely as an *amicus curiae* on the issue of state-official liability under the FCA, had championed the use of *Hafer* in arguing that state officials are "person[s]" amenable to *qui tam* suits for actions taken in their official capacities.[6]

The Ninth Circuit believed that if it were to "interpret § 3729 to preclude an action against state officials in their personal capacities, [such a] holding would be tantamount to a grant of absolute immunity under the FCA to state officials for any actions taken in the course of their governmental responsibilities." App., *infra*, 14a. "Such an interpretation," the court of appeals held, "[found] no support in the statutory language." *Id.* The Ninth Circuit therefore declined to "adopt an interpretation of § 3729" that it believed was "at odds with the statutory language and clear guidance from the Supreme Court." *Id.*

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[6] *See* Brief for the United States as *Amicus Curiae* Supporting Plaintiff/Appellant at 11, *United States ex rel. Stoner v. Santa Clara County Office of Educ.*, No. 04-15984 (9th Cir. filed Sept. 2, 2004), available at 2004 WL 2297734, at *11.

In addition, the Ninth Circuit held that Mr. Stoner did not have to allege that cross-petitioners personally profited from the complained-of conduct. *Id.* at 13a. According to the court of appeals: "Nothing in § 3729(a)(1) requires the person knowingly making a false submission to obtain a personal benefit from the wrongful act." *Id.*

The court of appeals also rejected cross-petitioners' assertion that allowing *qui tam* suits against individual state officials would "permit[] an end-run around *Stevens* and the Eleventh Amendment." *Id.* at 15a. The Ninth Circuit explained:

> An individual capacity suit for damages against state officials alleged to have personally violated § 3729 does not implicate the principles of state sovereignty protected by *Stevens* and our Eleventh Amendment jurisprudence because such an action seeks damages from the individual defendants rather than the state treasury. . . . Nor does the fact that a state may choose to indemnify the employees for any judgment rendered against them bring the Eleventh Amendment into play. . . .

Id. at 15a (citations omitted). Based on its decision that cross-petitioners could be sued in their personal capacities, the Ninth Circuit remanded the case to the district court and ordered that Mr. Stoner be given an opportunity to find counsel to prosecute his action against cross-petitioners. *Id.* at 22a.

5. The court of appeals denied cross-petitioners' request for en banc rehearing. App., *infra*, 40a. Shortly thereafter, the court of appeals granted cross-petitioners' motion to stay issuance of the

mandate pending this Court's review of the instant cross-petition. By order of the court of appeals, that stay was later extended until April 28, 2008.

On February 20, 2008, Mr. Stoner filed a petition for a writ of certiorari challenging aspects of the Ninth Circuit's decision not at issue here. The Court denied Mr. Stoner's petition on March 24, 2008. *See Stoner v. Santa Clara County Office of Educ.*, No. 07-1093 (U.S.), *cert. denied*, 76 U.S.L.W. 3470 (2008).

REASONS FOR GRANTING THE CROSS-PETITION

This Court's review is warranted for three, independent reasons. First, the law of the circuits on the issue of whether, or to what extent, a state official may be sued by a *qui tam* relator under the FCA is a patchwork of inconsistent and conflicting rulings. While the Ninth Circuit's decision finds support in rulings issued by courts from within the Tenth and Eleventh Circuits, it conflicts with the law of the Eighth Circuit and rulings from within the Third and Fourth Circuits. This Court's review is therefore warranted to bring uniformity to an important area of federal law left undecided by *Stevens*.

Second, the Ninth Circuit's ruling is inconsistent with the logic of this Court's decisions in *Stevens* and *Chandler*, both of which teach that the intent of the 1863 Congress controls the question of who or what is a "person" amenable to *qui tam* suits under the FCA. By relying upon this Court's decision in *Hafer* to interpret the meaning of the word "person" as it appears in 31 U.S.C. § 3729(a), the Ninth Circuit looked to the intent of the 1871 Congress in enacting what is now 42 U.S.C. § 1983. As is evidenced by the

plain language of § 1983, however, that statute was specifically designed to create a cause of action against state officials who violated certain federal laws. Therefore, this Court's decision in *Hafer* is an inappropriate analog for determining the intent of a *different* Congress that enacted a *different* statute whose plain language and legislative history do *not* reflect the intent to create a cause of action against state officials.

Third, the questions presented by this cross-petition are pure questions of federal law that are of national importance. The Ninth Circuit's decision exposes tens of thousands of state officials—and the state treasuries that may be called upon to indemnify those officials for actions taken within the scope of their official duties—to grave financial risk. Allowing *qui tam* suits against state officials will also interfere with the States' administration of numerous federal grant-in-aid programs in such diverse fields as health care, education and welfare. These programs already contain efficient administrative processes by which the Federal Government can adjudicate alleged contractual or regulatory noncompliance by state actors. Allowing private bounty hunters to police alleged noncompliance through the FCA—with its provision for treble damages and penalties as great as $11,000 per claim—will unnecessarily supplant these administrative remedies and in so doing force more state-federal disputes into federal court.

I. LOWER FEDERAL COURTS ARE DIVIDED ON THE QUESTION OF WHETHER, OR TO WHAT EXTENT, STATE OFFICIALS MAY BE SUED BY *QUI TAM* RELATORS UNDER THE FCA

In holding that state officials may be sued by *qui tam* relators for actions taken in the course of their official duties, the Ninth Circuit acknowledged that its decision conflicted with that of the Eighth Circuit in *Gaudineer*. App., *infra*, 13a. In *Gaudineer*, a private law firm acting as a *qui tam* relator filed suit against the State of Iowa and the state agency responsible for administering that State's Medicaid program. *See* 269 F.3d at 934. The relator also named the head of the state agency as a defendant, but only in his "official capacity." *See id.* The relator alleged that the defendants had established eligibility standards that resulted in the illegal expenditure of federal Medicaid funds. *See id.* at 934. After this Court issued its decision in *Stevens*, however, the relator sought leave to amend its complaint to name the state official as a defendant in his "individual capacity." *Id.* The relator's proposed amended complaint was almost identical to the original complaint and the district court denied the motion to amend. *See id.* at 935.

On appeal, a divided panel of the Eighth Circuit affirmed the district court's decision. *Id.* at 936. The two-judge majority rejected their dissenting colleague's assertion that *Hafer* meant the amendment should be granted as a matter of right. *See id.* Instead, the *Gaudineer* majority held that it was not enough for a relator to simply label the claim as one against the official in his individual capacity. *See id.*

Because the relator had failed to make specific allegations regarding the extent and nature of the state-official-defendant's duties, the court of appeals determined that the "mere assertion that [the state official] issued [eligibility] standards that conflicted with state law [did] not allege actions outside his official duties," and that "[u]nder these circumstances, the district court did not err in denying the motion for leave to amend to add a new claim against [the state official] in his individual capacity." *Id.* at 937.[7]

Gaudineer is consistent with other decisions holding that state officials are not amenable to *qui tam* suits for actions taken in the scope of their official duties. For example, in *Alexander v. Gilmore*, 202 F. Supp. 2d 478 (E.D. Va. 2002), two relators filed suit against several state officials alleging that the officials had violated the FCA by falsely certifying that

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[7] In a footnote, the *Gaudineer* majority stated that it did not need to decide whether the state-official-defendant was a "person" within the meaning of § 3729(a) or whether the Eleventh Amendment barred the suit. *See* 269 F.3d at 937 n.3. Like the Ninth Circuit in this case, however, the dissent in *Gaudineer* would have applied *Hafer* to hold that state officials are amenable to suit by *qui tam* relators for actions taken in their official capacities. *See* 269 F.3d at 938-39 (Gibson, J. dissenting). The relator in *Gaudineer* later filed a petition for a writ of certiorari that sought review of a single question substantially similar to the first question contained in this cross-petition: namely, whether a state official sued in his personal capacity is a "person" under the FCA following this Court's decision in *Stevens*. Pet. for Writ of Cert. at i, *United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, No. 01-1645 (U.S. filed Feb. 26, 2002), available at 2002 WL 32134711, at *i. The relator's petition was denied. *See* 536 U.S. 925 (2002).

the State would comply with certain federal guidelines in order to receive grant funding related to drug testing of prisoners. The *Alexander* court held that state officials acting in their official capacities are not "person[s]" amenable to *qui tam* suits under the FCA. *Id.* at 481-82.

Moreover, there is substantial disagreement regarding the question of whether a *qui tam* relator must allege that the state-official-defendant benefited personally from the complained-of conduct in order to assert a personal-capacity claim against a state official. *See Burlbaw*, 324 F. Supp. 2d at 1216 (recognizing disagreement). In *Alexander*, for example, the court specifically held that in order to assert a personal-capacity claim against state officials under the FCA, a relator must allege that the officials converted federal funds to their personal use. *See* 202 F. Supp. 2d at 482.

The *Alexander* court's ruling is consistent with that of several other courts. *See United States ex rel. Kinney v. Stoltz*, No. Civ. 01-1287, 2002 WL 523869, at *7 n.3 (D. Minn. 2002) (rejecting relator's personal-capacity claim against government officials because relator did not allege that the officials personally benefited from the alleged submission of false claims), *aff'd on other grounds*, 327 F.3d 671 (8th Cir. 2003); *United States ex rel. Honeywell, Inc. v. San Francisco Housing Auth.*, No. C99-1936, 2001 WL 793300, at *4 (N.D. Cal. July 12, 2001) (same); *Lane v. Texas Dep't of Health*, No. 03-02-00578-CV, 2003 WL 21750608, at *5 (Tex. App. July 30, 2003) (holding that "even if individual state officials or employees are sued in their individual capacities, no FCA liability arises unless there is evidence that the offi-

cial or employee converted the federal funds or property to their own personal use or benefit"); *cf. United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 221 (3d Cir. 2002) (affirming district court decision that government officials are not subject to suit under the FCA when the officials do not benefit personally from the conduct alleged), *vacated on other grounds*, 538 U.S. 918 (2003); *Smith v. United States*, 287 F.2d 299, 301 (5th Cir. 1961) (suggesting that FCA claims against government officials in their personal capacities should require allegations of personal gain); *United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998) (same).

The conflict between the Ninth Circuit's decision and a previous decision of that court, as well as several district court decisions from within the Ninth Circuit, provides additional evidence that lower federal courts need this Court's guidance on whether individual state officials are amenable to *qui tam* suits under the FCA for actions taken in their official capacities. In *United States ex rel. Bly-McGee v. California*, 236 F.3d 1014 (9th Cir. 2001), the relator sued several state officials alleging they had conspired to defraud the Federal Government of certain health care funds. *See id.* at 1017. The Ninth Circuit held that the officials were immune from *qui tam* liability for "conduct during performance of official duties." *Id.* at 1018. The court of appeals also determined that the state officials were "not immune for any actions that [were] wholly unrelated to or outside of their official duties." *Id.* The Ninth Circuit held that the relator's allegations of fraud were not pled with sufficient particularity and re-

manded the case with instructions that the relator be granted leave to file an amended complaint. *Id.*[8]

In addition to *Bly-McGee*, prior to the Ninth Circuit's ruling below, three district court decisions from within that Circuit had issued rulings limiting *qui tam* suits against government officials. *See McVey*, 165 F. Supp. 2d at 1058-59 (rejecting relator's reliance on *Hafer* and holding that state officials are immune from *qui tam* suits for actions taken within the scope of their official duties); *United States ex rel. Adrian v. Regents of Univ. of Cal.*, No. C 99-3864, 2002 WL 334915, at *3 n.2 (N.D. Cal. Feb. 25, 2002) (citing *McVey* and holding that *qui tam* relator could not sue state officials in their personal capacities); *Honeywell*, 2001 WL 793300, at *4 (holding that relator must allege government officials personally benefited from conduct in order to assert a personal-capacity claim under the FCA).

On the other hand, the Ninth Circuit's decision is consistent with rulings from within the Tenth and Eleventh Circuits. In *Burlbaw*, for example, two relators brought suit against New Mexico State University alleging that the school had violated the FCA

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[8] At least one court has distinguished *Bly-McGee* on the ground that the officials involved in that case were attorneys within the state attorney general's office. *See Burlbaw*, 324 F. Supp. 2d at 1216 n.4 (concluding that *Bly-McGee* holding was based on the prosecutorial-immunity doctrine). On its face, however, the Ninth Circuit's decision in *Bly-McGee* did not rely upon the prosecutorial-immunity doctrine in holding that the state-official-defendants were immune from *qui tam* liability for conduct during the performance of official duties. *See* 236 F.3d at 1018.

by falsely certifying that the school was a minority institution in order to receive certain research grants from the Federal Government. *See* 324 F. Supp. 2d at 1211. That suit was filed before this Court issued its opinion in *Stevens*. *See id.* As had happened in *Gaudineer*, the relators in *Burlbaw* sought leave to amend their complaint to name certain state officials as defendants in their personal capacities after this Court decided *Stevens*. *See id.*

In granting the motion to amend, the district court expressly recognized that a "holding granting only qualified immunity to an individual [state] employee sued under the FCA is in conflict with at least one circuit-court opinion and several district-court decisions." *Id.* at 1215. However, after surveying the decisions in *Gaudineer*, *Bly-McGee*, *Alexander*, *McVey*, *Kinney* and *Honeywell*, the district court held that state officials were "person[s]" within the meaning of the FCA and that the Eleventh Amendment did not bar *qui tam* suits against state officials. *See id.* at 1215-16. Moreover, the *Burlbaw* court expressly rejected the opinions of those courts that had held a state-official-defendant must benefit personally from the complained-of conduct. *Id.* at 1216.

The *Burlbaw* decision agrees with at least one other decision from within the Tenth Circuit. *See United States ex rel. Navarette v. Rockwell Int'l Corp.*, 730 F. Supp. 1031, 1035 (D. Colo. 1990) (holding that state-official-defendants were amenable to *qui tam* suits and that their "cloak of authority [was] not sufficient to shield them from liability"). Although the Tenth Circuit has heard oral argument in *Burlbaw*, it has yet to issue a decision. *See United*

States ex rel. Burlbaw v. Orenduff, No. 06-2006 (10th Cir. argued Mar. 5, 2007).

The district court rulings in *Burlbaw* and *Navarette* are also consistent with a district court ruling from within the Eleventh Circuit. *See United States ex rel. Battle v. Board of Regents of State of Ga.*, No. 1:00-CV-1637-TWT, 2002 WL 34386372 (N.D. Ga. May 8, 2002). In *Battle*, a former employee of a state university filed suit against various university officials alleging they had violated the FCA by mishandling student financial aid funds received from the Federal Government. *See United States ex rel. Battle v. Board of Regents of State of Ga.*, 468 F.3d 755, 757-58 (11th Cir. 2006) (per curiam) (discussing relator's factual allegations). After dismissing the *qui tam* complaint following this Court's decision in *Stevens*, the district court granted the relator's motion to reconsider and ordered that the case be reinstated. *See* 2002 WL 34386372, at *1. The *Battle* court adopted the logic of the *Gaudineer* dissent in holding that state officials are "person[s]" amenable to *qui tam* suits under the FCA. *Id.* at *2. In so doing, the court agreed with the arguments of the United States, which had submitted a brief solely as an *amicus curiae*. *See id.*

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As the preceding discussion demonstrates, the law of the circuits on the issue of whether, or to what extent, state officials m y be sued by *qui tam* relators under the FCA is a patchwork of inconsistent and conflicting rulings. This Court's review is therefore warranted to bring uniformity to an important area of federal law left unresolved by *Stevens*.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE LOGIC OF *STEVENS* AND *CHANDLER*

During the past decade, this Court has twice held that a court must look to the intent of the 1863 Congress to determine the meaning of the word "person" as it is used in what is now § 3729(a). *See Stevens*, 529 U.S. at 783 n.12; *Chandler*, 538 U.S. at 125. In *Chandler*, for example, this Court was asked to decide whether § 3729(a)'s use of the word "person" included municipal corporations. In answering that question in the affirmative, the Court asked whether at the time of the FCA's enactment in 1863, such was the understanding of American jurisprudence generally. *See* 538 U.S. at 125-28. Among other things, the Court looked to its own decisions in the early part of the nineteenth century and found that by 1863, there was "no doubt" that the term then extended to corporations. *Id.* at 125. The Court also looked to the "common understanding among contemporary commentators" to support its conclusion. *See id.*

In deciding that state officials acting in their official capacities are "person[s]" amenable to FCA *qui tam* suits, the Ninth Circuit below gave effect to the intent of a different Congress in enacting a different statute that, unlike the FCA, was specifically designed to create a cause of action against state officials. The Ninth Circuit relied upon *Hafer* to conclude that § 3729(a)'s use of the word "person" should be read to include state officials acting in their official capacities. *See* App., *infra*, 14a-15a. In so doing, the Ninth Circuit looked, not to the intent of the 1863 Congress as this Court instructed in *Stevens*

and *Chandler*, but to the intent of the 1871 Congress when it enacted what is now 42 U.S.C. § 1983. *See* Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (Civil Rights Act of 1871) (codified as amended at 42 U.S.C. § 1983).

As this Court recognized in *Hafer*, "Congress enacted § 1983 'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.'" 502 U.S. at 28 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974)). Based on the fact that § 1983 was designed in large part to remedy civil rights abuses by state actors, this Court held in *Hafer* that it would be illogical to interpret § 1983's use of the word "person" to exclude state officials—the very class of persons to whom the statute had been directed. *See id.*

The FCA, in contrast, was not directed at state actors, as this Court recognized in *Stevens* when it held that States and state agencies are not "person[s]" amenable to *qui tam* suits. In so holding, this Court traced the history of the statute and specifically rejected the argument that the word "person" as it appears in the FCA should be interpreted as if it were enacted by a modern-day Congress. *See* 529 U.S. at 783 n.12. The Court also reviewed the 1863 Act's legislative history and found no evidence that the 1863 Congress intended the FCA to regulate interactions between States and the Federal Government. *See id.*

The time period between 1863 and 1871 witnessed a fundamental shift in the relationship between the States and the Federal Government—a

fact evidenced by, *inter alia*, the 1868 ratification of the Fourteenth Amendment and the enactment of the Civil Rights Act of 1871. *See, e.g.*, *Quern v. Jordan*, 440 U.S. 332, 342 (1979) ("There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive province of the individual States."); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (describing § 1983 as a "product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century").

Therefore, although the meaning of the statutory term "person" as it relates to municipal corporations may not have changed during the eight-year time period between 1863 and 1871, *see Chandler*, 538 U.S. at 125, the 1868 ratification of the Fourteenth Amendment and the enactment of the Civil Rights Act of 1871 provide evidence that the meaning of the statutory term "person" as it relates to individual state officials acting in their official capacities did change and that at the time of the FCA's enactment in 1863, Congress did not intend for the term "person" to include state officials acting in their official capacities. *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (recognizing that in the context of interpreting 42 U.S.C. § 1981's protection of the right of all United States citizens to make and enforce contracts in the same manner enjoyed by "white citizens," that statutory term must be interpreted in light of the "understanding of 'race' in the 19th century" and that "all those who might be deemed Caucasian today were not thought to be of

the same race at the time § 1981 became law"); Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (Civil Rights Act of 1866) (statutory origin of what is now § 1981).

Moreover, Congress knows how to enact language providing for state-official liability when it intends civil statutes of general applicability to be so applied.[9] Congress has never included such language in the FCA.

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[9] *See, e.g.*, 15 U.S.C. § 1127 ("The term 'person' also includes . . . any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any . . . such . . . officer, or employee, shall be subject to the provisions of this chapter [relating to trademark protection] in the same manner and to the same extent as any nongovernmental entity."); 17 U.S.C. § 501(a) ("As used in this subsection [relating to copyright infringement], the term 'anyone' includes . . . any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any . . . such . . . officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity."); 17 U.S.C. § 910(a) ("As used in this subsection [referring to copyright protection for semiconductor chips], the term 'any person' includes . . . any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any . . . such . . . officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity."); 35 U.S.C. § 271(h) ("As used in this section [relating to patent infringement], the term 'whoever' includes . . . any officer or employee of a State or instrumentality of a State acting in his official capacity. Any . . . such . . . officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.").

Under the logic of this Court's decisions in *Stevens* and *Chandler*, it was manifest error for the Ninth Circuit to rely upon the intent of the 1871 Congress in enacting what is now § 1983 to discern the meaning of the word "person" as used by the 1863 Congress in enacting what is now § 3729(a).

III. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE AND THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR THEIR RESOLUTION

A. The question of whether *qui tam* relators can haul state officials into federal court based on injuries allegedly sustained by the Federal Government presents a pure question of federal law deserving of this Court's consideration. During the past decade, this Court has recognized the importance of deciding whether or when governmental actors may be sued by *qui tam* relators under the FCA. *See Stevens*, 529 U.S. 765; *Chandler*, 538 U.S. 119; *cf. Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005) (addressing statute-of-limitations question in *qui tam* case involving governmental actors).

The *qui tam* device presents unique dangers when applied against state actors, as the following colloquy between members of this Court and counsel for the United States during oral argument in *Stevens* makes clear:

> QUESTION [by Justice O'Connor]: Well, presumably the United States has an—an array of additional remedies. It's not like the State is going to get away with something, is it?

MR. KNEEDLER: No, but Congress specifically determined in 1986 that those other remedies were inadequate and that the False Claims Act measures, including the provisions for informers to bring information to the United States or to—to file suit were critical to ferret out and—and redress.

QUESTION [by Justice Breyer]: But that's the very point. Hundreds of billions of dollars of joint programs means that when you bring the States in, it changes the nature of the statute. It's one thing to have private people, you know, going through technical violations and searching the books of private companies. It's quite another to set loose an army of people on the States who will find every technical violation they can because they get money for it.

MR. KNEEDLER: But that—that—

QUESTION [by Justice Breyer]: So, the latter should be left to the political process or other methods, not this one. That's the argument.

MR. KNEEDLER: But that—that concern does not go to the question of whether the United States itself should be able to bring a False Claims Act—

QUESTION [by Justice Breyer]: No, no. It goes to the question of whether you take the word person, which up till 1986 has in practice [not included] States, and then just say that a background statement and a couple of other little—little things in the statute, maybe worth an ounce each,

> should be taken to work what I would characterize pejoratively—I don't really mean it—as a kind of revolution in the way the States—potentially a revolution in the way that the States—
>
> MR. KNEEDLER: But again, your concern goes I—I thought primarily to the question of the *qui tam* provision. That's different from the United States. If the United States is bringing the suit, it can—it can exercise all appropriate cautions.

Tr. of Oral Arg., *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, No. 98-1828, 1999 WL 1134650, at *48-50 (Nov. 29, 1999).

Under the FCA, a *qui tam* relator need not "exercise all appropriate cautions" in prosecuting an action against state officials. As the Ninth Circuit below acknowledged: "Unless it intervenes or moves to dismiss, the United States has little control over the conduct of the action." App., *infra*, 21a. The relator's crusade against state officials can be motivated solely by the desire to settle a political "score," ill-will following the loss of a job or outright greed, for

> [a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. . . . *Qui tam* relators are thus less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 949 (1997).

B. The question of whether *qui tam* relators can haul state officials into federal court also raises issues that go to the very core of our federalist system of government. Although this Court's precedents teach that the States' sovereign immunity does not shield them from civil suits prosecuted by the United States, *see United States v. Texas*, 143 U.S. 621, 646 (1892), this Court's precedents also suggest that the United States may not assign its ability to pierce the States' sovereign immunity, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991) ("The [States'] consent, inherent in the convention, to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select.") (quotation marks omitted). In similar fashion, the States' consent to suit by the Federal Government is not consent to suit by private, self-deputized bounty hunters presuming to act on behalf of the Federal Government.

This Court has not decided whether the States' sovereign immunity shields state officials from suit when those officials are sued by *qui tam* relators for actions taken within the scope of their official duties. *But see Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945) ("[W]hen the action is, in essence, one for the recovery of money from the state, the state is the real, substantial party in interest, and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."). The Court has recognized, however, that in cases involving state sovereign immunity, the identity of the person bringing suit is of great importance. For example, in *Alden v. Maine*,

527 U.S. 706 (1999), the Court was asked to decide whether a State's sovereign immunity precluded a suit in state court brought by state employees under the federal Fair Labor Standards Act. In finding that States' immunity from private suit in their own courts was beyond congressional power to abrogate under Article I legislation, the Court explained:

> The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

Id. at 759-80.

If the United States believes that an FCA case is of sufficient importance to take action against state officials for acting in their official capacities, it can bring the case on its own or assume primary responsibility for prosecuting the action rather than ceding that delicate task to private bounty hunters.

C. This case provides an excellent vehicle for resolving the questions presented, which are likely to reoccur. Although the case below was decided at the motion-to-dismiss stage, the questions presented are pure questions of federal law that require no additional factual development. *See, e.g.*, *Chandler*, 538 U.S. at 124 (deciding whether municipal corporations are "person[s]" under § 3729(a) following district court's decision granting motion to dismiss); *Stevens*, 529 U.S. at 770 (deciding whether States and state

agencies are "person[s]" under § 3729(a) on interlocutory review following denial of motion to dismiss). Moreover, unlike in *Gaudineer*, the "person" and Eleventh Amendment questions were decided by the Ninth Circuit below, thereby making this case an excellent vehicle for deciding the questions presented by this cross-petition.

As demonstrated by the progression of events in *Gaudineer*, *Burlbaw* and *Battle*, Mr. Stoner's effort to sue individual state officials under the FCA is representative of relators' efforts to avoid this Court's decision in *Stevens*. *See also* Leon Dayan & Jason Walta, *Qui Tam Suits Against Public Entities After Stevens*, 19 False Claims Act & Qui Tam Q. Rev. 15, 32 (2000) (concluding that "personal-capacity suits provide an alternative option" for "*qui tam* plaintiffs whose claims have been jeopardized by the decision in *Stevens*"). As such, this effort will only continue in light of the uncertainty fostered by rulings such as the Ninth Circuit's below.

D. The Ninth Circuit's ruling will place an undue burden on State treasuries. As the *Burlbaw* court recognized, the financial consequences of allowing *qui tam* suits against state officials for actions taken within their official capacities will in large part be borne by the States. *See* 324 F. Supp. 2d at 1218 n.7 (noting that "even though a judgment against an individual state employee is against the employee himself and not against the state, most states have by statute or otherwise agreed to indemnify an employee who is held liable for actions taken within the course and scope of his duties"). With its provision for treble damages and penalties as great as $11,000 per claim, judgments and settlements of FCA cases

often reach tens of millions of dollars, an expense that under the logic of the Ninth Circuit's decision will be charged to the States.

The Ninth Circuit's ruling will also interfere with the administration of numerous federal grant-in-aid programs. As reflected by the factual diversity of cases discussed herein, the questions presented by this cross-petition arise not only in the context of federal special education funding (as was the case here), but in cases involving the provision of health care under Medicaid and similar programs (*Gaudineer*; *Bly-McGee*), administration of welfare benefits (*Graber*), housing subsidies (*Honeywell*), research grants to institutions of higher education (*Burlbaw*; *Navarette*), administration of federal laboratories (*McVey*) and prison programs (*Alexander*). Those relationships confer extraordinary discretion on state administrators and they are subject to extensive administrative monitoring, audit and financial recovery processes. *See, e.g.*, 42 C.F.R. §§ 430.32-430.48 (describing procedures in Medicaid context). By allowing *qui tam* relators to sue state officials for actions taken within the scope of their official duties, the Ninth Circuit's decision will unnecessarily supplant these carefully tailored discretionary mechanisms and force more state-federal disputes into federal court.

E. Finally, the amount of federal resources already dedicated to adjudicating the questions presented by this cross-petition serves as a strong indicator of the questions' national importance. The United States Department of Justice (DOJ) has deemed the questions presented by this cross-petition to be important enough that it has appeared

unsolicited as an *amicus curiae* in two recent court of appeals cases raising these issues. In addition to filing a brief and appearing at oral argument in the Ninth Circuit below, DOJ likewise appeared before the Tenth Circuit in the as-yet undecided appeal of *Burlbaw*. *See also Battle*, 2002 WL 34386372, at *2 (discussing DOJ *amicus* submission arguing in favor of state-official *qui tam* liability). This dedication of resources clearly reflects that the questions presented by this cross-petition are national in scope and are deserving of this Court's consideration.[10]

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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[10] Interestingly, DOJ has taken a seemingly inconsistent position in the context of who is a "person" capable of *commencing* an action under the FCA. *See United States ex rel Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1208 (10th Cir. 2003) (en banc) (discussing DOJ argument that federal officials who obtain information about potential fraud in the scope of their official duties are not "person[s]" capable of commencing *qui tam* actions).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DAVID STONER, individually; UNITED STATES OF AMERICA, Ex Rel. John David Stoner,

Plaintiffs-Appellants,

and

THE STATE OF CALIFORNIA; COUNTY OF SANTA CLARA,

Plaintiffs,

v.

SANTA CLARA COUNTY OFFICE OF EDUCATION; EAST SIDE UNION HIGH SCHOOL DISTRICT; COLLEEN B. WILCOX; JOE FIMIANI; DAVID WONG,

Defendants-Appellees.

No. 04-15984

D.C. No. CV-03-04622-JW

OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
May 17, 2007—San Francisco, California

Filed September 7, 2007

Before: Diarmuid F. O'Scannlain and Sandra S. Ikuta, Circuit Judges, and Leonard B. Sand,* Senior Judge.

Opinion by Judge Ikuta

COUNSEL

John David Stoner, Sunnyvale, California, for himself.

Peter D. Keisler, Assistant Attorney General; Kevin V. Ryan, United States Attorney; Douglas N. Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, Washington, D.C., as amicus curiae, by special leave of court.

Mark E. Davis and Marc J. Cardinal, Needham, Davis, Kirwan & Young LLP, San Jose, California, for the appellees.

OPINION

IKUTA, Circuit Judge:

Under the False Claims Act ("FCA"), "[a]ny person" who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval" is liable to the Government for a civil penalty, treble damages, and costs. 31 U.S.C. § 3729(a)(1). The FCA authorizes a private person, known as a relator, to bring a *qui tam* civil action "for a violation of section 3729 for the

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* The Honorable Leonard B. Sand, Senior United States District Judge for the Southern District of New York, sitting by designation.

person and for the United States Government . . . in the name of the Government." 31 U.S.C. § 3730(b)(1). This case requires us to decide whether a *pro se* relator may bring a *qui tam* action in federal court on behalf of the government against various actors in the California school system.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant John David Stoner brought this *qui tam* action in the United States District Court for the Northern District of California against the Santa Clara County Office of Education ("SCCOE"), his former employer, the East Side Union High School District ("ESUHSD"), and three SCCOE employees, Colleen Wilcox, Joe Fimiani, and David Wong. In the proceedings before the district court, Stoner appeared *pro se*. Although Stoner is a licensed attorney, and has been admitted to practice before this court, *see* Fed. R. App. Proc. 46(a), he is not a member of the State Bar of California, and consequently could not be admitted to membership before the district court for the Northern District of California, *see* Northern District of California, Civil Local Rule 11-1. Stoner's complaint alleged that defendants presented various fraudulent claims for payment or approval to the United States in violation of the False Claims Act ("FCA"). Specifically, he claimed that defendants falsely certified compliance with the Individuals with Disabilities Education Act to induce the government to disburse more money for certain educational programs. Stoner's complaint also raised a number of

state law claims, including alleged violations of the California False Claims Act.

As required by the FCA, Stoner filed his complaint under seal and served it on the United States. *See* 31 U.S.C. § 3730(b)(2). After the United States declined to intervene, the complaint was unsealed and served on the SCCOE. The SCCOE immediately moved to dismiss the claims against it, arguing, among other things, that it was not a "person" subject to liability under the FCA. The remaining defendants joined in that motion.

The district court granted the motion to dismiss after determining that the complaint failed to state a claim under the FCA. *See* Fed. R. Civ. P. 12(b)(6). The court held that the FCA did not provide a cause of action against the SCCOE and the ESUHSD because each entity is a state agency, and thus not a "person" subject to liability under the FCA. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000) (holding that the FCA does not subject a state or state agency to liability in a *qui tam* action brought by a private relator). Relying on *United States ex rel. McVey v. Board of Regents of the University of California*, 165 F. Supp. 2d 1052, 1058-59 (N.D. Cal. 2001), the court also held that Stoner could not sue the individual SCCOE employees in their personal capacities under the FCA for actions committed in the course of their official responsibilities. In addition, the court *sua sponte* raised the issue of Stoner's authority to prosecute a *qui tam* action on behalf of the United States *in propria persona* and held that Stoner could not proceed

pro se[1] on the FCA claims. The court then declined to exercise supplemental jurisdiction over Stoner's remaining state law claims and dismissed Stoner's complaint in its entirety. Stoner filed this timely appeal. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001) (noting that a motion to dismiss becomes a final appealable order within the meaning of 28 U.S.C. § 1291 when the district court order disposes of all claims against all parties).[2]

STANDARDS OF REVIEW

"A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo." *Marder*, 450 F.3d at 448. "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff. Dismissal of the complaint is appropriate

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[1] The phrases *in propria persona* and *pro se* are synonymous. *See* Black's Law Dictionary 1256 (8th ed. 2004); *see also Savage v. Estelle*, 924 F.2d 1459, 1460 n.1 (9th Cir. 1990) ("no legal distinction" between the phrases in the context of self-representation).

[2] Prior to oral argument in this case, Stoner filed a request for judicial notice of certain documents not part of the record on this appeal. The defendants oppose Stoner's request on the grounds that the documents submitted are unauthenticated, lack foundation, and do not satisfy the requirements of Rule 201 of the Federal Rules of Evidence. Because the documents at issue do not fall within the narrow exception to the general rule that the scope of this court's review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint, *see Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006), Stoner's request for judicial notice is denied.

only if it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *McGary v. City of Portland*, 386 F.3d 1259, 1261 (9th Cir. 2004) (internal citation omitted).

Questions of statutory interpretation and the existence of sovereign immunity are also reviewed de novo. *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1213 (9th Cir. 1996); *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004).

DISCUSSION

I.

We first address the question whether school districts in California, including county offices of education, are subject to *qui tam* liability under the FCA. We begin our analysis with the language of the statute itself. The FCA subjects to liability any "person" who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). Section 3729 does not define the term "person." However, *Stevens* held that a state or state agency is not a "person" for purposes of § 3729 and, therefore, not subject to liability in *qui tam* suits brought by private parties. 529 U.S. at 787-88.

In light of *Stevens*' holding, we must determine whether the SCCOE, a California county office of education, and the ESUHSD, a California school district, are state agencies. Although we have not yet considered this issue in the context of the FCA, we previously determined that a California school dis-

trict and county office of education were state agencies for purposes of Eleventh Amendment sovereign immunity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996). The district court looked to these cases in ruling that neither the SCCOE nor the ESUHSD was a "person" within the meaning of 31 U.S.C. § 3279.

We agree with the district court's approach. As explained below, *Stevens* teaches that our Eleventh Amendment case law should guide our determination of whether an entity is a state agency and thus not a "person" for purposes of § 3279. *Stevens*' analysis of the word "person" in § 3279 was driven by canons of statutory construction relating to protection of the state's sovereign immunity. *See Stevens*, 529 U.S. at 781-87. Specifically, *Stevens* based its holding that neither a state nor a state agency were "persons" within the meaning of § 3279 on the following canons of statutory construction related to state sovereignty: (1) the presumption that the term "person" does not include the sovereign, *id.* at 780; (2) the rule that Congress must clearly state its intention to subject states to liability, *id.* at 781-82, 787; (3) the presumption against imposition of punitive damages on governmental entities, *id.* at 784-85; and (4) "the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute," *id.* at 787. Applying these canons, the Court observed that "far from providing the requisite affirmative indications that the term 'person' included States for purposes of *qui tam* li-

ability," Congress expressed a contrary intent. *Id.* This conclusion was buttressed by "the doctrine that statutes should be construed so as to avoid difficult constitutional questions." *Id.* With respect to this last point, the Supreme Court explained that there was "'a serious doubt'" on the question whether an action in federal court by a *qui tam* relator against a state or a state agency would be consistent with the Eleventh Amendment, *id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)), although the Court was careful to "express no view" on this issue. *Id.* In effect, the Court presumed that in enacting the FCA, Congress intended not to infringe on a state's sovereign immunity and therefore did not make states subject to suit under the FCA.

To effectuate Congress's presumed intent, we must interpret the term "person" under § 3279 in a way that avoids suits against "state instrumentalities" that are effectively arms of the state immune from suit under the Eleventh Amendment. *See also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) (instructing lower courts to refer to the Eleventh Amendment arm-of-the-state analysis in determining whether an entity is an agency of the state and thus not a "person" for purposes of 42 U.S.C. § 1983 (citing *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977))). Our conclusion that we must rely on our Eleventh Amendment jurisprudence to determine whether an entity is a "person" within the meaning of § 3279 is further underlined by our post-*Stevens* holding that "states and state agencies enjoy sovereign immunity from liability under the FCA." *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th

Cir. 2001); *see also United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1145 (9th Cir. 2004). Both *Bly-Magee* and *Ali* implicitly recognize that Eleventh Amendment principles guided the Supreme Court's decision in *Stevens*.

We thus look to our Eleventh Amendment case law in determining whether the SCCOE and the ESUHSD are state agencies not subject to FCA liability under *Stevens*. We have held that a California school district and county office of education are arms of the state for purposes of Eleventh Amendment sovereign immunity. *Belanger*, 963 F.2d at 254; *Eaglesmith*, 73 F.3d at 860. Accordingly, we must conclude that neither the SCCOE nor the ESUHSD is a "person" subject to liability under § 3279 of the FCA. *Stevens*, 529 U.S. at 781-87. By the same reasoning, Stoner's *qui tam* action against the SCCOE and the ESUHSD is barred by the Eleventh Amendment. *Ali*, 355 F.3d at 1145; *Bly-Magee*, 236 F.3d at 1017.

Stoner asks us to revisit *Belanger* and *Eaglesmith* in light of *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), which was decided by the Supreme Court five years after *Belanger*. He contends that after *Regents*, a state agency is not shielded by the state's sovereign immunity unless the state is directly liable for any money judgment rendered against the agency. We disagree. *Regents* holds that the Eleventh Amendment may bar a lawsuit against a state agency in circumstances where the state is legally liable for a judgment against that agency, even if the state is indemnified against that liability by a third party. *Id.* at 426. But nothing in *Regents* requires us to depart from the well-

established Eleventh Amendment principle that a governmental entity may be an arm of the state protected by sovereign immunity where the state is functionally liable, even if not legally liable, on money judgments against the state entity. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 50 (1994) ("Where an agency is so structured that, as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." (internal quotation marks omitted)); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (The Eleventh Amendment "protect[s] the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." (emphasis added)). In decisions issued after *Regents*, we held that California school districts and county offices of education are entitled to the state's Eleventh Amendment immunity, due in part to their statutorily mandated relationship with the state, which (among other things) makes the state treasury unconditionally liable to make up any budgetary shortfall encountered by either entity as a result of an adverse judgment. *See Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 780-81 (9th Cir. 2005); *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1183 (9th Cir. 2003); *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1042 (9th Cir. 2003); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1142 (9th Cir. 2002). These cases make clear that *Belanger* and *Eaglesmith* remain binding authority of this circuit following *Regents*.

Following *Belanger* and *Eaglesmith*, therefore, we hold that the SCCOE and the ESUHSD are arms of the state, and therefore not "persons" subject to *qui tam* liability under the FCA. Stoner thus has no statutory authority to bring an FCA claim against the SCCOE and the ESUHSD. *See* 31 U.S.C. § 3729(a); *Stevens*, 529 U.S. at 787-88. By the same token, the Eleventh Amendment poses an independent bar to *qui tam* action against either entity. *Bly-Magee*, 236 F.3d at 1017. Accordingly, the district court properly dismissed Stoner's FCA claims against both entities.

II.

We next turn to the district court's dismissal of the FCA claims asserted against the three individual SCCOE employees named in Stoner's complaint. While Stoner's complaint does not specify the capacity in which he was suing Wilcox, Fimiani, and Wong, "[t]he course of proceedings" in this case indicates that Stoner was suing these employees in their individual, as well as official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) ("In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed." (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985))). With respect to the official capacity claims, the district court held that the individually named defendants could not be sued for damages in their official capacities because such a suit would, in effect, be against the state. *See Will*, 491 U.S. at 71 (concluding that a state official sued in his or her official capacity for money damages is

not a "person" subject to suit under 42 U.S.C. § 1983 because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and for this reason "is no different from a suit against the State itself"). The parties do not challenge this ruling and we express no opinion on the merits of the district court's conclusion.

The district court also held that Stoner failed to state an FCA claim against the individual defendants in their personal capacities because Stoner could not allege that the defendants' actions exceeded the scope of their official responsibilities. As explained below, this was an error. The plain language of the FCA subjects to liability "any person" who, among other things, knowingly submits a false claim or causes such a claim to be submitted to the United States. 31 U.S.C. § 3729. Although the FCA does not define the term "person," the Supreme Court has made clear that the term includes "natural persons." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003); *see also* 1 U.S.C. § 1 (defining the term "person" for purposes of "determining the meaning of any Act of Congress" as including an individual). Therefore, state employees sued in their personal capacities are "persons" who may be subject to liability for submitting a false claim to the United States. *Cf. Hafer v. Melo*, 502 U.S. 21, 27 (1991) (concluding, in context of case filed pursuant to 42 U.S.C. § 1983, that "[a] government official in the role of personal-capacity defendant . . . fits comfortably within the statutory term 'person'").

To state a claim against Wilcox, Fimiani, and Wong in their personal capacities, Stoner need show

only that the individual employees "knowingly present[ed], or caus[ed] to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Stoner's complaint alleged that Wilcox, Fimiani, and Wong knowingly presented or caused to be presented false or fraudulent statements to the United States Department of Education to obtain federal funds for various educational programs. If true, these allegations are sufficient to state a claim for personal liability under 31 U.S.C. § 3729(a)(1). Stoner need not allege that the individual defendants personally profited from such false submissions. Nothing in § 3729(a)(1) requires the person knowingly making a false submission to obtain a personal benefit from the wrongful act.

In dismissing the FCA claims against Wilcox, Fimiani, and Wong, the district court relied on *McVey*, 165 F. Supp. 2d at 1058-59, which held that "[u]nder the FCA, a state official is immune from suit for actions taken in his position," even where it is alleged that the official abused his authority. *Id.* at 1059; *see also United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 937 (8th Cir. 2001) (holding that state official could not be sued under the FCA in his individual capacity unless he was acting "outside his official duties" when he took the action alleged to violate the FCA (quoting *Bly-Magee*, 236 F.3d at 1016)). We disagree with *McVey* and *Gaudineer* to the extent the reasoning of these cases cannot be reconciled with the plain language of the statute.

Our conclusion is supported by the Supreme Court's decision in *Hafer*, which rejected the argu-

ment that state officials may not be held personally liable under 42 U.S.C. § 1983 for actions taken in their official capacities. 502 U.S. at 27-31. The Court reasoned that to hold otherwise would, in effect, "absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities." *Id.* at 28. The Court noted that such absolute immunity extends only to a very limited class of officials, "including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions." *Id.* at 29 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982)).

Hafer's reasoning is equally applicable to our interpretation of the FCA. The individual defendants named in Stoner's complaint do not fall into the narrow class of officials entitled to absolute immunity. Were we to interpret § 3729 to preclude an action against state officials in their personal capacities, our holding would be tantamount to a grant of absolute immunity under the FCA to state officials for any actions taken in the course of their governmental responsibilities. *See Hafer*, 502 at 27-29. Such an interpretation finds no support in the statutory language. It is also contrary to the principles of the Supreme Court's well-established public employee immunity jurisprudence. *Id.* at 29 (citing *Harlow*, 457 U.S. at 807); *see also United States ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp. 2d 1209, 1215 (D.N.M. 2004). We decline to adopt an interpretation of § 3729 that is at odds with the statutory language and clear guidance from the Supreme Court. We therefore hold that state employ-

ees may be sued in their individual capacities under the FCA for actions taken in the course of their official duties.[3]

The individual defendants challenge this straightforward conclusion by contending that it permits an end-run around *Stevens* and the Eleventh Amendment. They argue that a relator precluded from asserting a *qui tam* action against a state agency could bring the same action against individual state employees in their personal capacity. We find this argument unpersuasive. An individual capacity suit for damages against state officials alleged to have personally violated § 3729 does not implicate the principles of state sovereignty protected by *Stevens* and our Eleventh Amendment jurisprudence because such an action seeks damages from the individual defendants rather than the state treasury. *See Alden v. Maine*, 527 U.S. 706, 757 (1999). Nor does the fact that a state may choose to indemnify the employees for any judgment rendered against them bring the Eleventh Amendment into play. *See Demery v. Kupperman*, 735 F.2d 1139, 1147-1148 (9th Cir. 1984) (state may not impart sovereign immunity, and thereby prevent vindication of federal rights in federal court, by adopting an indemnification policy). As the Supreme Court explained, "the distinction between-official capacity suits and per-

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[3] Of course, state employees sued under the FCA may be entitled to qualified immunity. Any personal immunity defenses that may be available to Wilcox, Fimiani, and Wong, including the defense of qualified immunity, are not before us in this stage of the proceedings where the defendants have not yet filed an answer.

sonal-capacity suits is more than 'a mere pleading device.'" *Hafer*, 502 U.S. at 27 (quoting *Will*, 491 U.S. at 71). Where a plaintiff seeks to hold individual employees personally liable for their knowing participation in the submission of false or fraudulent claims to the United States government, the state is not the real party in interest, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984), and the Eleventh Amendment poses no barrier to such a suit. *Hafer*, 502 U.S. at 30-31.

To summarize, we hold that state officials, sued for damages in their individual capacities, are "persons" within the meaning of 31 U.S.C. § 3729. The Eleventh Amendment does not bar such suits. Accordingly, the district court erred in holding that Stoner had failed to state a claim under § 3729 against Wilcox, Fimiani, and Wong, in their personal capacity.

III.

Finally, we must address the district court's determination that Stoner could not proceed *pro se* on this FCA action. As noted above, although Stoner is an attorney, he was not a member admitted to practice before the district court as a matter of the court's local rules. It has long been established that an individual wanting to prosecute or defend an action in federal court must be represented by a lawyer admitted to practice before that court, unless such individual is permitted to proceed *pro se* under 28 U.S.C. § 1654 or other federal law, *see C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987), or is himself an attorney granted *pro hac vice* admission. Stoner did not secure *pro hac vice* admission, but sought to proceed *pro se*. The general *pro se*

provision set forth in 28 U.S.C. § 1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ." While this provision allows Stoner to prosecute his own actions *in propria persona*, that right is personal to him, and absent some other statutory authorization, Stoner has no authority to prosecute an action in federal court on behalf of others than himself. *C.E. Pope Equity Trust*, 818 F.2d at 697.

However, this is exactly what Stoner seeks to do. Stoner has brought this action pursuant to 31 U.S.C. § 3730(b)(1), which provides that a "person," known as the relator, "may bring a civil action for a violation of section 3729 for the person *and for the United States Government* . . . in the name of the Government." 31 U.S.C. § 3730(b)(1) (emphasis added). As this court has explained, "the entire purpose of the FCA's *qui tam* provisions is to employ the help of individuals to uncover fraud against the government." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993). To this end, the FCA motivates "a private individual [to] bring suit in federal court *on behalf of the United States*" by effecting a partial assignment of the government's damages claim to the relator. *Stevens*, 529 U.S. at 768 (emphasis added).

Although the partial assignment allows the relator asserting the government's injury to satisfy the requirements of Article III standing, it does not transform a *qui tam* action into the relator's "own case" for purposes of § 1654. The FCA makes clear that notwithstanding the relator's statutory right to the government's share of the recovery, the underly-

ing claim of fraud always belongs to the government. *See* 31 U.S.C. § 3730(c)(5) (providing that "the Government may elect to pursue *its claim* through any alternate remedy" (emphasis added)). Accordingly, where the government chooses not to intervene, a relator bringing a *qui tam* action for a violation of § 3729 is representing the interests of the government and prosecuting the action on its behalf. *See* 31 U.S.C. § 3730(b)(1); *see also United States v. Schimmels (In re Schimmels)*, 127 F.3d 875, 882 (9th Cir. 1997) ("[T]he United States is the real party in interest in any False Claims Act suit, even when it permits a *qui tam* relator to pursue the action on its behalf.'" (quoting *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992))); *Kelly*, 9 F.3d at 743 ("The express language of the FCA gives relators the right to bring suit *on behalf of the government*." (emphasis added)). Nor does the FCA "support a finding that the government and the relators can pursue their interests . . . separately," *Schimmels*, 127 F.3d at 884, such that relators could bring their "own case" without binding the government. Rather, the United States "is bound by the relator's actions" for purposes of res judicata and collateral estoppel. *Id.*; *see also United States ex rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 16 (D.D.C. 2003); *United States ex rel. Schwartz v. TRW Inc.*, 118 F. Supp. 2d 991, 996 (C.D. Cal. 2000). Because *qui tam* relators are not prosecuting only their "own case" but also representing the United States and binding it to any adverse judgment the relators may obtain, we cannot interpret § 1654 as authorizing *qui tam* relators to proceed *pro se* in FCA actions.

Because the general *pro se* provision, 28 U.S.C. § 1654, does not authorize Stoner to proceed *pro se* on behalf of the government, Stoner must identify an alternate source of authority granting him this privilege. This Stoner has failed to do. The FCA itself does not authorize a relator to prosecute a § 3729 violation *pro se*. While the FCA gives a relator the "right to conduct the action," 31 U.S.C. § 3730(c)(3), Stoner can point to no language enabling a relator to conduct the action without a licensed attorney. Given the fact that Congress did not expressly authorize a *qui tam* relator to proceed *pro se* when acting on behalf of the United States, it "must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that only one licensed to practice law may conduct proceedings in court for anyone other than himself." *United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951).

The Supreme Court's recent decision in *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), does not suggest a contrary conclusion. *Winkelman* considered whether the parents of a child covered by the Individuals with Disabilities Education Act ("IDEA") could proceed *pro se* in federal court to enforce IDEA's guarantee of a free appropriate public education for their child. *Id.* at 2000-05. The central question in *Winkelman* was whether IDEA grants parents the same independent substantive right to a free appropriate public education as it does their child, and thus whether unrepresented parents would be proceeding on their own behalf or on behalf of their child in an action to enforce this right in federal court. *Id.* at 1998. After examining

IDEA's statutory scheme, the Court held that the parents could bring such an action *pro se* pursuant to 28 U.S.C. § 1654 because IDEA gives the parents their own "independent, enforceable" right to the substantive adequacy of their child's education. *Id.* at 2005.

While *Winkelman* reaffirms that *pro se* plaintiffs are entitled to enforce their own independent rights in federal court under § 1654, it has no direct application here because the FCA makes clear that a relator brings a *qui tam* suit on behalf of the government. Unlike IDEA, which allows parents to proceed on their own behalf to vindicate their substantive right to a free appropriate public education for their child, the substantive right underlying the FCA action is the government's right not to be defrauded. *See Stevens*, 529 U.S. at 771 (The relator "is suing to remedy an injury in fact suffered by the United States."). The relator's interest in the lawsuit is limited to certain procedural guarantees, in addition to the "bounty" the relator will receive for successfully assisting the government in vindicating the government's substantive rights. *See Stevens*, 529 U.S. at 772. Stoner's reliance on *Winkelman* in the context of the FCA is thus misguided.

Our conclusion that a *pro se* relator cannot prosecute a *qui tam* action on behalf of the United States is consistent with the decisions of other circuits to have addressed the issue. *See United States ex rel. Lu v. Ou*, 368 F.3d 773, 775-76 (7th Cir. 2004); *see also Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2d Cir. 1974); *United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951).

In an effort to distinguish these cases, Stoner argues that he is not truly proceeding *pro se* because the FCA grants the government a degree of oversight over the action, *see* 31 U.S.C. § 3730(c)(3). We are not persuaded. Unless it intervenes or moves to dismiss, the United States has little control over the conduct of the action. *See generally* 31 U.S.C. § 3730. For purposes of 28 U.S.C. § 1654, an unrepresented relator is not transformed into a relator represented by counsel merely because the government has some oversight of the case. The strong policy considerations underlying the general rule that parties may not represent the interests of others in federal court support our conclusion that the government's minimal oversight does not overcome Stoner's *pro se* status. In cases as complicated as *qui tam* actions, a licensed attorney is best equipped to present the complex legal and factual issues involved and "[a] federal court rightly expects a lawyer to represent a litigant." *C.E. Pope Equity Trust*, 818 F.2d at 697.

We therefore agree with the district court that Stoner is not entitled to proceed *pro se* in his action. In the dismissal order from which this case arises, the district court ruled that Stoner would be given a period of time in which to secure counsel if this action otherwise survived the defendants' motion to dismiss. Because we conclude that Stoner has stated a claim under the FCA against the individual defendants, we remand this case to the district court with instruction to give Stoner reasonable time to find counsel or, in the alternative, obtain *pro hac vice* admission. If Stoner fails to retain counsel or obtain *pro hac vice* admission, the district court should dis-

miss this action, without prejudice to the government.

IV.

For the reasons discussed above, we reverse the district court's ruling dismissing the FCA claims against the individual defendants named in Stoner's complaint.[4] We otherwise affirm the rulings of the district court. We remand this case for further proceedings consistent with this opinion. Each party shall bear its own costs on appeal. *See* Fed. R. App. P. 39(a)(4).

AFFIRMED in part; **REVERSED** in part; **REMANDED**.

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[4] The defendants also contend that Stoner's complaint fails to allege an actionable false certification upon which federal funding was conditioned. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996) ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit."). The district court did not address this argument and we decline to resolve it here without giving the district court the opportunity to do so in the first instance. *See Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) ("Generally, we do not consider an issue not passed upon below." (internal quotation marks omitted)).

APPENDIX B

FILED
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RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA.S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

The United States of America et al., Ex Rel. John David Stoner,

Plaintiff(s),

v.

Santa Clara County Office of Education et al.,

Defendant(s).

NO. C 03-4622 JW

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF SUBJECT MATTER JURISDICTION

Docket No. 11

I. INTRODUCTION

This is a *qui tam* action. Plaintiff John Stoner, *in pro per*, filed this action on behalf of himself, the

United States, and the State of California (collectively "Stoner") against the Santa Clara County Office of Education ("SCCOE"), the East Side Union High School District ("ESUHSD") and three SCCOE employees. Stoner alleges violations of the Federal and California False Claims Acts and asserts other related state claims. Defendant SCCOE has moved to dismiss all of Stoner's claims for failure to state a claim, lack of subject matter jurisdiction, and lack of supplemental jurisdiction. Based upon the papers filed to date and the argument of counsel, the SCCOE's motion is GRANTED.

II. BACKGROUND

Stoner worked as a teacher at the SCCOE's Foothill Pilot Program from December 21, 2001 through June 30, 2003. In 2003, Stoner was not re-elected to his position and his employment was terminated on June 30. During his employment with the SCCOE, Stoner alleges that all defendants were involved in submitting false claims to the United States and the State of California in order to obtain funding for certain education programs. Stoner apparently complained about these activities to his employer, but nothing was resolved and he was eventually terminated.

On October 17, 2003, Stoner filed this action against defendants alleging eleven claims for relief. Stoner's first three claims are made on behalf of himself and the United States under the False Claims Act ("FCA"). Stoner's fourth, fifth, and sixth claims are made on behalf of himself and the State of California under the California False Claims Act ("CFCA"). His seventh claim for relief is made solely on behalf of himself under the CFCA's whistleblower

provision. The remainder of Stoner's eleven claims involve contract and employment related claims against the SCCOE and its employees.

After filing this action, Stoner contacted the U.S. Attorney General, the California Attorney General, and the Santa Clara County Counsel regarding participation in this dispute. All government offices declined to intervene. Stoner was permitted to proceed *qui tam* on behalf of the United States and California against the defendants.

The SCCOE was the only defendant served at the time its motion was filed. Recently, the SCCOE's counsel accepted service for the remaining defendants the ESUHSD and SCCOE employees Colleen Wilcox, Joe Fimiani, and David Wong. Presently before the Court is the SCCOE's motion to dismiss Stoner's first seven FCA/CFCA claims either for failure to state claim or for lack of subject matter jurisdiction. In addition, the SCCOE has moved to dismiss the remainder of Stoner's state claims for lack of supplemental jurisdiction if the Court first dismisses all the federal claims. Since all defendants are now commonly represented and SCCOE's motion to dismiss equally applies to the other defendants, the Court will include the other defendants in its ruling on SCCOE's motion to dismiss.

III. STANDARDS

A. Federal Rule of Civil Procedure 12(b)(1)

Rule 12(b)(1) allows a party to challenge a federal court's jurisdiction over the subject matter of the complaint. A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either facially or factually. *See*

Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). In considering a motion to dismiss for lack of subject matter jurisdiction, the court must accept all of plaintiff's factual allegations as true. *See Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1997).

B. Federal Rule of Civil Procedure 12(b)(6)

In ruling on a motion to dismiss, the court must accept as true all allegations of material fact and must construe said allegations in the light most favorable to the non-moving party. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enterprises*, 476 F.2d 393, 396 (9th Cir. 1973).

A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts stated under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). In order to grant a motion to dismiss, it must appear to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

IV. DISCUSSION

Under the FCA, "any person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," is liable to the Government for a civil penalty, treble damages, and costs. 31 U.S.C. § 3729(a)(1). Although the Attorney General may sue under the FCA, a private person, known as a relator, may also

bring a *qui tam* action "in the name of the Government." *Id.* at § 3730(b). The relator must inform the Justice Department of his intentions and keep the pleadings under seal while the Government decides whether to intervene and do its own litigating. *Id.* at § 3730(b)(2). If the claim succeeds, the relator's share may be up to 3[illegible] percent of the proceeds of the action, plus reasonable expenses, costs, and attorney's fees. *Id.* at § 3730(d).

The CFCA, Cal. Gov. Code § 12650 *et*[] *seq*[.], was enacted in 1987 and is patterned largely on its federal counterpart the FCA. *American Contract Services v. Allied Mold & Die, Inc.*, 94 Cal. App. 4th 854, 858 (2001). The Act is designed to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities by authorizing private parties, referred to as *qui tams* or relators, to bring suit on behalf of the State of California. *Id.* The ultimate purpose of the Act is to protect the public fisc. *Id.* As such, the Act must be construed broadly so as to give the widest possible coverage and effect to its prohibitions and remedies. *LeVine v. Weis*, 90 Cal. App. 4th 201, 210 (2001). Under the CFCA, a party who knowingly presents a false claim to a public entity to induce it to pay is liable for treble the damages sustained by the entity, plus costs, attorney fees and a maximum fine of $10,000 for each false claim. Cal. Gov. Code § 1265(a)(1)-(2). Damages may also be assessed against any party who benefits from the inadvertent submission of a false claim if the party, after learning of the claim's falsity, fails to disclose it to the public entity within a reasonable time. *Id.* at § 12651(a)(8). The relator must inform the Attorney

General of his intentions and keep the pleadings under seal while the Government decides whether to intervene and do its own litigating. *Id.* at § 12651(c)(2)-(4). If the claim succeeds, the relator's share may be up to 50 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. *Id.* at § 12652(g)(3).

Relator Stone's first three claims seek relief under the FCA, and his fourth, fifth, sixth, and seventh claims seek relief under the CFCA. The SCCOE has moved to dismiss these seven claims under Rule 12(b)(6) on the grounds that: (1) the SCCOE is not a proper party under either the FCA or the CFCA, and (2) Stoner failed to exhaust all his administrative remedies under Cal. Gov. Code § 12654(d)(4). In addition, the SCCOE has moved to dismiss Stoner's entire complaint for lack of subject matter jurisdiction, under Rule 12(b)(1), on the grounds that: (1) the SCCOE is immune from suit under either the FCA or the CFCA pursuant to the Eleventh Amendment to the U.S. Constitution, and (2) this Court lacks supplemental jurisdiction over Stoner's remaining state claims The Court addresses SCCOE's arguments below and, *sua sponte*, raises the issue of whether Stoner can represent the United States in this action *in pro per*.

A. Only one who his [sic] licensed to practice law can represent the United States in a *qui tam action*.

The Court, *sua sponte*, first raises the issue of whether Stoner, proceeding *in pro per*, can represent the United States in a *qui tam* action. The Court finds that he cannot. It is axiomatic that a non-

lawyer may not represent any person or entity other than himself. *Rowland v. California Men's Colony*, 506 U.S. 194, 201-03 (1993) (listing cases holding that non-lawyers may not represent partnerships or corporations in federal court); *Johns v. County of San Diego*, 114 F.3d 874, 876 (9th Cir. 1997) ("[a] guardian or parent cannot bring suit on behalf of a minor in federal court without retaining a lawyer"); *In re America West Airlines*, 40 F.3d 1058, 1059 (9th Cir. 1994) (per curiam) (holding that a non-attorney may not appear on behalf of a partnership); *United States v. High Country Broadcasting Co.*, 3 F.3d 1244, 1245 (9th Cir. 1993) (per curiam) (non-lawyer sole shareholder may not represent corporation and was properly precluded from intervening and representing himself where his "interests [were] identical to the corporation's"); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 698 (9th Cir. 1987) (non-lawyer trustee may not appear for trust); Phillips v. Tobin, 548 F.2d 408, 413-15 (2d Cir. 1976) (pro se litigant may not bring shareholders' derivative action). As the Eighty Circuit Court of Appeals has noted,

> we do not think that Congress could have intended to authorize a layman to carry on [a *qui tam* action under the False Claims Act] as attorney for the United States but must have had in mind that such a suit would be carried on in accordance with the established procedure which requires that only one licensed to practice law may conduct proceedings in court for anyone other than himself.

United States v. Onan, 190 F.2d 1, 6 (8th Cir.), *cert. denied*, 342 U.S. 869, 96 L. Ed. 654, 72 S. Ct. 112 (1951). At the March 1, 2004 hearing on SCCOE's

motion to dismiss, Stoner admitted that while he is a retired member of one or more state bars, his current inactive status does not allow him to practice law. He is simply not licensed to represent the United States in this action.

In general, the Court would not immediately dismiss a *qui tam* action that is brought *in pro per*. *See Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2d Cir. 1978) (suggesting that, where a non-lawyer seeks to prosecute a *qui tam* suit *in pro per*, the correct remedy would be to direct that the action be dismissed "unless an attorney is retained."). Stoner would normally be given a set time period to secure counsel, but the Court is persuaded that other grounds warrant the dismissal of Stoner's federal claims. The Court addresses these grounds in turn.

B. Stoner's FCA claims against the SCCOE and the ESUHSD are dismissed for failure to state a claim because they are state agencies and not "persons" subject to suit under the FCA.

The FCA subjects liability to "any person," who among other things, "knowingly presents or causes to be presented, to an officer or employee of the Unites [sic] States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). The SCCOE argues that it and the ESUHSD, being state agencies, are not suable "persons" within the meaning of the FCA. In support of its argument, the SCCOE relies heavily on the U.S. Supreme Court's opinion in *Vermont Agency of Natural Resources v. United State* [sic] *ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858 (2000). In *Vermont*, the Supreme Court

held that states and state agencies are not "persons" subject to *qui tam* actions under the FCA. 529 U.S. at 787-788.

While it is true that states and state agencies cannot be subject to suit under the FCA, *Vermont* did not address whether the same holds for local government entities. The Supreme Court recently held that local government entities, e.g., municipalities, are subject to suit under the FCA. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 122 (2003). The key issue, therefore, is whether the SCCOE and ESUHSD are state agencies or a [sic] local government entities.

In determining whether a government entity is a state agency, at least for Eleventh Amendment purposes, the Ninth Circuit uses a five-factor test: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued in its own name; (4) whether the entity has the authority to hold property in its own name; and (5) whether the entity has the corporate status of a state agency. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988); *Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 250-51 (9th Cir. 1992); *see also Regents of the Univ. of Cal*, 519 U.S. at 429 n.5 (whether an entity is an arm of the state "can be answered only after considering the provisions of state law that define the agency's character"). These five factors are well known as the *Mitchell* factors. *Belanger*, 963 F.2d at 251. The Ninth Circuit has found using the *Mithchell* [sic] factors that California school districts and offices of education are state agencies. *See Belanger*,

963 F.2d at 250-51 (involving a Section 1983 claim against a California school district); *J.C. Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996) (involving a Section 1983 claim against a California office of education). This Court finds it proper to use the *Mitchell* factors to determine whether the SCCOE and ESUHSD are "persons," i.e., whether they are state agencies or local government entities, within the meaning of the FCA. *See Vermont*, 529 U.S. at 779 (holding that the question of whether the [FCA] itself permits a cause of action is "logically antecedent to the existence of" the Eleventh Amendment question).

In *Eaglesmith*, the Ninth Circuit applied the *Mitchell* factors in determining that the Mendocino County Office of Education ("MCOE") was a California state agency for the purposes of the Eleventh Amendment:

> Although the MCOE, like a California school district, may sue and be sued and may hold property in its own name, militating against a finding that it is a state agency, these two factors are not entitled to as much weight as the other three. Here, as in Belanger, a money judgment would be satisfied out of state funds. In addition, public school education is a central government function and the MCOE is an intergral [sic] part of that function. Finally, the fifth factor, corporate status of state agents, offers no basis for distinguishing Belanger from this case. The MCOE, like the school district in Belanger, has the corporate status of an agent of the state for the operation of the school system.

73 F.3d at 860 (citations omitted). In reaching its decision, the court relied heavily on its decision in *Belanger* where it held that the first factor, the source of funds to be awarded, is the most crucial consideration. *Belanger*, 963 F.2d at 251 ("The most 'crucial question . . . is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.'") (citations omitted). Essentially, if a money judgment against a school district were to be satisfied out of state funds instead of local funds, e.g., property tax revenues, then the first *Mitchell* factor should weigh in favor of classifying a school district as a state agency. In *Belanger*, the Ninth Circuit found that the structure of California's centralized school funding system causes state and local revenue to be commingled into a single fund under state control. *Id.* at 251-252. As such, a money judgment against the SCCOE or ESUHSD would be paid from state funds because it is undisputed that their funding is controlled by California's school funding system. But Stoner argues that a monetary judgment against the SCCOE may be paid out of local funds instead of state funds because the SCCOE keeps records of which funds are which. The plaintiff in *Belanger* made this identical argument, and the court responded that "in light of California's centralized school funding system, this argument is irrelevant." The court explained:

> Under the [California] revenue limit system, state and local revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district

budget. Any local funds withdrawn from the budget to pay a judgment are unavailable for education purposes, and state funds in the budget must cover any critical educational expenses that the local funds would have covered absent the judgment. This effectively draws state funds away from other programs in the budget to pay the judgment. In essence, any use of the commingled funds is a use of state funds. See Mitchell, 861 F.2d at 201 (stressing that "the district's budget is made up of funds received from the state's general fund pursuant to a state calculated formula").

Moreover, the local character of property tax revenue is lost when it is commingled with state funds under a state controlled revenue limit. As the district court noted, "If the entitlement from the property tax decreases, the amount of the revenue limit entitlement funded by the state increases, and vice-versa." Under the centralized revenue limit system, the allocation of property tax revenue is hopelessly intertwined with the allocation of state funds, and any change in the allocation of property tax revenue has a direct effect on the allocation of state funds.

Finally, because the state has complete control over the amount of property tax revenue that the district receives, and because this revenue is simply credited toward the revenue limit payment from the state fund, the property tax revenue is no more local than state income taxes generated from the same area. The state has assumed the burden of funding public schools, and property tax revenue allocated to the public school revenue

> limit program is state money collected for a state purpose.
>
> In summary, the bulk of the school district's budget comes directly from the state school fund, and the property tax revenue in the budget is interchangeable with the state funds and is treated as state funds for all practical purposes. Under California's revenue limit system, a judgment against the school district would be satisfied from state funds.

Belanger, 963 F.2d at 252.

The SCCOE and ESUHSD must manage their funds in accordance with Califonia [sic] law, and under California's revenue limit system, a judgment against either of these entities would be satisfied from state funds. *See id.* Accordingly, this Court comes to the same conclusion as did the Ninth Circuit in *Eaglesmith* and *Belanger*: the SCCOE and ESUHSD have the corporate status of an agent of the state for the operation of their school system. Therefore the SCCOE and ESUHSD, being state agencies, are not "persons" subject to *qui tam* actions under the FCA. *Vermont*, 529 U.S. at 787-788.

Stoner argues that cases like *Eaglesmith* and *Belanger* are distinguishable because they involve actions by private citizens under 42 U.S.C. § 1983 and not *qui tam* actions under the FCA. Stoner contends that while a Section 1983 action may result in a monetary judgment payable to a private citizen, a judgment under the FCA will be paid to the U.S. because such an action is brought on behalf of the U.S. This Court is not convinced. First, Stoner fails to cite any case law for this proposition. In addition,

out of an FCA monetary award, the relator's share may be up to 30 percent of the proceeds of the action, plus reasonable expenses, costs, and attorney's fees. 31 U.S.C. § 3730(d). If Stoner succeeded in a monetary award, it is clear that these funds would be paid from the State of California to Stoner, and such liability is impermissible under the Ninth Circuit's reasoning in *Belanger*. 963 F.2d at 251-52 ("The most 'crucial question . . . is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.'") (citations omitted).

Because the SCCOE and ESUHSD are not "persons" subject to liability in a *qui tam* FCA action, the Court need not decide if these entities are immune from suit under the Eleventh Amendment. For the reasons stated above, Stoner's first three FCA claims against the SCCOE and ESUHSD are dismissed for failure to state a claim. *See Wool*, 818 F.2d at 1439 (dismissal is proper if it appears to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved.).

B. Stoner's FCA claims against the remaining employee defendants are also dismissed for failure to state a claim because they are being sued in their official capacities.

Stoner also asserts his three FCA claims against three SCCOE employees. As discussed above, the FCA "does not subject a State (or state agency) to liability in such actions." *Vermont*, 529 U.S. at 787-88. And if the SCCOE employees are being sued in their official capacities, then the FCA claims against them must be dismissed because an action against a state

official in his official capacity "is not a suit against the official but rather is a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *United States ex rel. McVey v. Bd. of Regents*, 165 F. Supp. 2d 1052, 1058 (N.D. Cal. 2001). In an effort to save his claims, Stoner attempts to characterize his FCA claims against the SCCOE employees as claims against them in their individual capacities. The Court is not convinced. The Court has reviewed the pleadings and finds Stoner offers no evidence that the employee defendants were acting outside their official capacities during the incidents in question. At oral argument, Stoner argued that the employee defendants stepped outside their official capacities because they abused their authorities. The Court concludes that such allegations do not suffice. *See McVey*, 165 F. Supp. 2d at 1059 (holding that abuse of authority allegations would not suffice to sustain an FCA claim against a state official in his individual capacity). As such, Stoner's FCA claims against the three SCCOE employees are dismissed for failure to state a claim. *See Wool*, 818 F.2d at 1439 (dismissal is proper if it appears to a certainty that a plaintiff would not be entitled to relief under any set of facts which could be proved.). Since all FCA claims have been dismissed against all defendants, only state claims remain in Stoner's complaint.

C. This Court chooses not to exercise supplemental jurisdiction over Stoner's remaining state claims.

A district court may decline to exercise supplemental jurisdiction over a state claim if the court has dismissed all claims over which it has original juris-

diction. 28 U.S.C. 1367(c). The Court has dismissed all federal claims in this action. Stoner's remaining claims involve state questions under the California False Claims Act as well as California contract and employment law. This Court declines to rule whether Stoner may maintain CFCA claims against a state agency, and, in its discretion, declines to exercise supplemental jurisdiction over Stoner's remaining state claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (When all federal-law claims are eliminated before trial, "the balance of factors to be considered under the pendent jurisdiction doctrine -- judicial economy, convenience, fairness, and comity -- will point toward declining to exercise jurisdiction over the remaining state-law claims."). As such, Stoner's remaining state claims are dismissed for lack of subject matter jurisdiction.

V. CONCLUSION

For the reasons stated above, the SCCOE's motion to dismiss is GRANTED as to all defendants. Stoner's first, second, and third claims for relief are dismissed for failure to state a claim pursuant to Rule 12(b)(6). Stoner's remaining state claims are dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Finally, this Court holds that only a licensed attorney, properly admitted to the presiding court, may bring a *qui tam* action on behalf of the United States. All future Court dates in this action are vacated.

Dated: March 8, 2004

s/
JAMES WARE
United States District Judge

APPENDIX C

FILED
NOV 23 2007
CATHY A. CATTERSON
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DAVID STONER, individually; et al.,

Plaintiffs-Appellant,

And

THE STATE OF CALIFORNIA; et al.,

Plaintiffs,

v.

SANTA CLARA COUNTY OFFICE OF EDUCATION, et al.,

Defendants-Appellees.

No. 04-15984

D.C. No. CV-03-04622-JW

Northern District of California, San Jose

ORDER

Before: O'SCANNLAIN AND IKUTA, Circuit Judges, and SAND,* Senior Judge.

* The Honorable Leonard B. Sand, Senior United States District Judge for the Southern District of New York, sitting by designation.

The panel has voted to deny Appellees' Petition for Rehearing. Judges O'Scannlain and Ikuta have voted to deny Appellees' Petition for Rehearing En Banc, and Judge Sand recommends denying the en banc petition.

The full court has been advised of the Petition for Rehearing En Banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

APPENDIX D

1. The Eleventh Amendment to the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. Section 3729 of Title 31, United States Code, provides in pertinent part:

False claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * * * *

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

* * * * *

4. Section 3730 of Title 31, United States Code, provides in pertinent part:

Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney

General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the

same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

* * * * *

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable

attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

* * * * *

5. Section 1983 of Title 42, United States Code, provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

6. The Act of March 2, 1863, ch. 67, 12 Stat. 696, provides in relevant part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or

by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . . shall be deemed guilty of a criminal offence, and shall be subject to the rules and regulations made for the government of the military and naval forces of the United States . . . .

* * * * *

SEC. 3. *And be it further enacted*, That any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act, he shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, and every such person shall in addition thereto, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars.

* * * * *

SEC. 4. *And be it further enacted*, That the several district courts of the United States, the circuit court of the District of Columbia, or any court therein to be established having general jurisdiction in civil cases, the several district courts of the Territories of the

United States within whose jurisdictional limits the persons doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States. . . .

* * * * *

SEC. 6. *And be it further enacted*, That the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half the amount of the damages he shall recover and collect . . . .

* * * * *

SEC. 8. *And be it further enacted*, That no officer or agent of any banking or other commercial corporation, and no member of any mercantile or trading firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation or firm; and every such . . . officer, agent, or member, or person, so interested, who shall so act, shall, upon conviction thereof, be punished by a fine of not more than two thousand dollars nor less than five hundred dollars, and by imprisonment for a term not exceeding two years.

* * * * *

7. The Act of April 20, 1871, ch. 22, 17 Stat. 13, provides in relevant part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THE UNITED STATES OF AMERICA, EX[] REL[.] JOHN DAVID STONER; JOHN DAVID STONER, QUI TAM PLAINTIFF FOR THE STATE OF CALIFORNIA AND SANTA CLARA COUNTY; AND JOHN DAVID STONER, INDIVIDUALLY

Plaintiffs,

v.

CASE NO. C03-4622

SANTA CLARA COUNTY OFFICE OF EDUCATION, EAST SIDE UNION HIGH SCHOOL DISTRICT, COLLEEN B. WILCOX, PH.D., JOE FIMIANI, AND DAVID WONG

Defendants.

COMPLAINT
DEMAND FOR JURY TRIAL

1. John David Stoner, a private person, brings this action in the name of the Government of the United States for a violation of the False Claims Act, 31 U.S.C. § 3729 et seq. as amended, under the authority of § 3730(b) of that act.

2. John David Stoner, a "person" under the definition of that word in California Government Code § 12650(b)(5), also brings this action on behalf of

himself and the State of California and Santa Clara County for the violation of the California False Claims Act, Government Code § 12650 et. seq., as amended, particularly § 12652(c).

3. John David Stoner also brings this action on his own behalf against the Santa Clara County Office of Education, Colleen Wilcox, Joe Fimiani and David Wong (County Defendants):

a. Under the California Whistle Blower Protection Act, California Government Code, §§ 12650, et seq., The California Whistleblower Protection Act, Government Code §§ 9149.20 et seq., and the California False Claims Act, Government Code §§12650, et seq. as amended, particularly § 12653 (c) and (d).

b. For breach of an employment contract, fraudulent misrepresentations, termination of an employment contract contrary to public policy, terminating an intern employment without permitting the intern employee to complete his internship and in violation of the rights of a probationary employee to receive notice, reasons and a right to appeal.

I[.] JURISDICTION

4. Jurisdiction is conferred upon this court with respect to paragraph 1 above, by 31 U.S.C. § 3732 (a) as amended, by 28 U.S.C. §§ 1331 and 1345, by 20 U.S.C. § 1403 and by its general equitable jurisdiction.

5. Jurisdiction is conferred upon this court with respect to paragraph 2 above, by 31 U.S.C. §[]3732(b) since the claims under the State Law arise from the

same transactions and occurrences on which the claims in paragraph 1 are based.

6. Paragraph 3 is within the jurisdiction of this court conferred by 31 U.S.C. §[]3732(b), since the claims under the State Law arise from the same transactions and occurrences on which the claims in paragraph 1 are based, and is also within the ancillary jurisdiction of this Court since the facts related to these claims are also included in the facts on which the actions in paragraph 1 and 2 are based.

7. This Court has personal jurisdiction over Defendants because they conduct business, are located and reside in the Northern District of California[.]

II[.] INTRADISTRICT ASSIGNMENT

8. Venue is proper in this Court under 28 U.S.C. § 3732(a) and Federal Civil Local Rule 3-2(c) because a substantial part of the events or omissions which give rise to the claims occurred in Santa Clara County, which is in this Division and District.

III[.] PARTIES

9. The plaintiff with respect to the first paragraph is the United States of America. This action is brought on behalf of the United States Department of Education. At all times material to this action, the Department of Education was an agency and instrumentality of the United States and its activities, operations and contractual obligations were paid, at least in part, from federal funds. Federal funds went directly, or indirectly through the State of California, to both the Santa Clara County Office of Education (SCCOE) and the East Side Union High School District (ESUHSD) for the purposes of educating stu-

dents with special needs. Additional federal funds went directly or indirectly through the State of California to SCCOE in conjunction with the Intern program in which the qui tam plaintiff, John David Stoner, participated.

10. The plaintiffs with respect to the second paragraph of the Complaint are the State of California and Santa Clara County. At all times material to this action, the California Department of Education was an agency and instrumentality of the State of California and its activities, operations and contractual obligations were paid from state, county and federal funds. State funds went to both SCCOE and ESUHSD for the purposes of educating students with special needs. Additional state funds went to SCCOE in conjunction with the Intern program in which the qui tam plaintiff, John David Stoner, participated[.]

11. At all times material to this action, Santa Clara County, which is a political subdivision of the State of California, collected local property taxes, part of which were paid to both SCCOE and ESUHSD for the purposes of educating students with special needs and by SCCOE in the intern program in which the qui tam plaintiff participated.

12. The qui tam plaintiff, John David Stoner, during the period December 21, 2001 through June 30, 2003 was an employee of the Santa Clara County Office of Education (SCCOE) serving under contracts which provided that he would serve as an intern employee as a "Teacher of Students with Severe Disabilities, Foothill Pilot." His Intern Credential (Authorized Field: Moderate/Severe Disabilities) authorizes him to "provide instruction and related services

to individuals with a primary disability of . . . serious emotional disturbance . . . under the joint supervision of "San Jose State University and Santa Clara County."

13. Defendant (SCCOE) provides direct instruction to students in programs such as Special Education. It also provides instructional, administrative, business and technical support services to the county's 32 school districts, including to Defendant ESUHSD. In its staff handbook, SCCOE claims to be "a champion of public education, serving as an exemplary regional resource for students, parents, teachers, school districts, agencies and businesses."

14. SCCOE runs the Foothill Pilot Program (High School) for students with emotional disabilities in facilities located on the campus of an alternative school run by Defendant ESUHSD. The Foothill Pilot Program is the program referred to in SCCOE's contract with the qui tam plaintiff.

15. SCCOE also runs two other classrooms for students with special needs on this campus of an alternative school run by Defendant ESUHSD.

16. Defendant Colleen B. Wilcox, Ph.D., is Santa Clara County Superintendent of Schools and the chief executive officer of Defendant SCCOE.

17. Defendant Joe Fimiami [sic] was the Director of Special Education, SCCOE, and was and continues to be the compliance officer who is charged with receiving complaints "which, if true, would constitute a violation by that local educational agency of federal or state law or regulation governing the programs listed in Section 4610(b) of this Chapter." California Code of Regulations Tittle [sic] 5 § 4630(a).

18. This reference to § 4610(b) includes in subsection (vii) "Special Education programs established pursuant to Education Code Sections 56000 through 56885 and 59000 through 59300." The Foothill Pilot Program in which the qui tam plaintiff is involved is covered by these sections of the Education Code.

19. Defendant David Wong is principal of over 15 special education programs, including the Foothill Pilot program, run by Defendant SCCOE.

20. He is employed to supervise the teachers in the programs he oversees more than half time during any school week.

21. Eastside Union High School District (ESUHSD), makes space available on the campus of one of its alternative schools for three special education classrooms under the SCCOE principal, David Wong (David Wong Classrooms). These three classrooms, which include the Foothill Pilot Program, are in Special Education Local Plan Area (SELPA) number V. ESUHSD and SCCOE are members of this SELPA V.

IV[.] PARTIES

22. Defendants SCCOE and ESUHSD receive funds from three sources to carry out their educational programs. These are the United States Government, the Government of the State of California and Santa Clara County.

23. The Revenue Projection for 2001/2002 SELPA V and the Preliminary Revenue Projection for 2002/2003 says the revenue for SCCOE and the Districts in Santa Clara County come from three sources: "Fed Local, State Aid, Excess Prop Tax."

(pages 29, 31, South East Consortium for Special Education Annual Budget Plan & Annual Service Plan 2002-2003) (See Appendix A-1. All references in this Complaint to A-1 through A-7 are to the Appendix appended to this Complaint.) Another sheet provided to the qui tam plaintiff by the SELPA V, labeled Revenue Comparison East Side, lists East Side Revenue as: "State Aide Revenue, Sp Ed Prop Tax and Fed Local Asst."

24. An analysis of the documents referred to in the preceding paragraph indicates the State Aid for East Side runs between 47% and 50%, the Property tax between 32% and 34% and the Federal Local Assistance is between 18% and 20%.

25. The pages 29 and 31 in the budget document referred to above raise some question about whether the figures may reflect some special adjustment, but they indicate the State Aid for the SCCOE is between 48% and 62%, the Property Tax is between 17% and 22% and the Federal Local Assistance is between 20% and 29%.

26. The federal funds are distributed through the State of California after it certifies to the United States Department of Education that it is complying with the federal laws and regulations.

27. The State, in turn, distributes federal funds and state funds to the County Offices of Education and School Districts who are obliged to submit their educational plans to the State with certifications that they are complying with both the federal and the state laws and regulations.

28. The following description by the United States Court of Appeals for the 4th Circuit describes this

process: "Congress established a three-tiered funding, administration, and implementation scheme, under which the state must submit a plan of compliance to the Secretary of Education which provides federal IDEA funds to the State. See 20 U.S.C. §§ 1412-1414. The state is then responsible for administering the funds on the state level, including the distribution of federal funds to local education agencies (LEAs) and the implementation of policies and procedures to ensure that each LEA expends the funds in a manner consistent with the purpose and substantive provisions of IDEA. See id. §§ 1413(a), 1414(b). In order to qualify for IDEA funds, each LEA must apply to the state education agency (SEA) and provide certain assurances of compliance with IDEA. See id. § 1414(a). The LEA then provides services directly to children with disabilities using the funds obtained from the SEA." *Gadsby v. Grasmick*, 109 F.3d 940, 943 (4th Cir. 1997).

29. Since both federal and state funds were involved in the Foothill Pilot Program and the other SCCOE special education programs at the same location as the Foothill Pilot Program, none of these programs would have been authorized absent the assurances of compliance that were required for these programs. If not authorized to carry on these educational activities they would not have been entitled to use funds collected in Santa Clara County for educational purposes.

30. "Local school boards used to have some control over their property tax revenues. But now, decisions about how much money to allocate to education, and how to do it, are in the hands of the governor and legislators. Their decisions must be made within the

constitutional requirements of Proposition 13 and of Proposition 98, the funding guarantee for kindergarten through community college and state schools." (EdFact: A Primer on School Finance at http://www.ed-data.k12.ca.us/Finance/SF_Prime 2.asp)

V[.] AMOUNTS OF FUNDS DEFENDANTS HAVE USED IN VIOLATION OF THE FALSE CLAIMS ACTS

31. Documents the qui tam plaintiff received from the SELPA in which the Foothill Pilot program is located indicates that the actual costs of the class of programs that includes the Foothill Pilot program runs over $300,000 per year.

32. By June 30, 2002 the Foothill Pilot Program had been running for approximately two and one-half years and it continues to operate.

33. The actual costs of the class of programs that includes the other two classrooms in the David Wong Classrooms significantly exceeded $225,000 per year.

34. The David Wong Classrooms, other than the Foothill Pilot Program, were operating in 1998 when the SCCOE certified its programs were in compliance with the federal and state laws and regulations. They continue to operate.

35. The total actual cost of the programs in the David Wong Classrooms for the period July 1, 2001 through June 30, 2003 was $780,905, and these programs are continuing in the current academic year.

36. The total actual cost of the programs in the other two David Wong Classrooms for the period July 1, 2001 through June 30, 2003 was $935,272.

37. The approximate cost of the Foothill Pilot Program for January to June 30, 2001 is over $150,000. The [a]pproximate cost of the other two David Wong Classrooms for the years July, 1998 through June 30, 2001 is over $1,350,000. Adding these two figures together (over $1,500,000) plus the costs of all three classrooms for July 2002 through June 30, 2003 ($1,716,177), makes the total cost of the three David Wong Classrooms for the period July 1998 through June 30, 2003 over $3,200,000.

38. In addition, the intern program run by the Defendant SCCOE involves another set of expenditures not included above. Defendant SCCOE, in its response to a request for public documents said: "The CCTC [California Commission on Teacher Credentialing] is the sole source of funding for the Intern Program."

39. If this statement by the SCCOE is true, it is an admission of another violation of the law. "Each . . . county office of education that receives a grant shall provide matching funds from any available source in an amount equal to 50 percent of the cost of the alternative certification program, but in no event shall the grant amount awarded to any . . . county office of education exceed two thousand five hundred dollars ($2,500) per intern per year. . . . EDUCATION CODE § 44386(a)[.]

40. The papers that Defendant SCCOE did supply the qui tam plaintiff indicate that the internship teaching program budget summary for FY 1999-2000 had $100,000 funded and $72,700 unfunded. Another sheet marked amendment shows a budget of $50,000 funded and $40,000 unfunded. The latter figure was changed in ink to $43,616 and initialed "EW."

41. On September 29, 2003, Ellen Welt, director of instructional services who is in charge of the intern program, called the qui tam plaintiff saying he had called accounting and asked about the intern program. She said there was no requirement for the county office to provide matching funds, that the intern program was solely a grant from the state based on the number of interns they had in February of each year and that the county spent more on it than it got from the state. When I asked her about the initials EW, she acknowledged that those are her initials, but refused to discuss what "underfunded" meant or anything else about the paper. She said she did not have it before her. When I suggested she get it and call me back, she said she would refer the matter to Ms. Kidwiler, the person who signed the June 10, 2003 letter to me that enclosed this paper with EW handwritten on it. Ms. Welt said she was uncomfortable talking to me and refused to say any more.

42. No indication was given as to whether the differences in these figures were returned to the state, but Ms. Welt told me in the above telephone conversation that what was not used was supposed to be returned. In any event, this indicates that for the four years 1999 – 2003, the SCCOE probably spent over $360,000 on the Intern program and it is still continuing.

43. There is no explanation in these papers what "funded" and "unfunded" mean, but it appears that the "funded" portion is the amount SCCOE received from the CCTC. The source of the funds in the "unfunded" amount is not clear. Information from the CCTC suggests that there may be some federal funds

available for training but the SCCOE's refusal to be forthcoming about the funds in the intern program means that the source and actual amount of these intern funds will probably have to wait until discovery. Indeed, since some of the figures for the overall costs of the David Wong Classrooms are estimates, the exact total amount will not be determinable until after discovery, but it appears the total will be around or over $3,500,000. Approximately 20% of this represents federal funds and 80% state and county funds.

VI[.] STATEMENTS BY THE DEFENDANTS

44. The Assurance Statement in the "Local Plan for Special Education, South East Consortium For Special Education Santa Clara County July 1, 2003 (current Local Plan) says, in part, that it is "the policy of the ESUHSD that a Free Appropriate Public Education is available to all children residing in the ESUHSD between the ages of 3 and 21 inclusive, including children with disabilities who have been suspended or expelled from school. Appropriate education is that combination of educational and related service(s) as determined on an Individualized Education Program (IEP) that meets the unique needs of each individual in order to benefit from his/her access to educational opportunities." Current Local Plan (A-2 p.1)[.]

45. This current Local Plan also provides that it is the "policy of the ESUHSD that all pupils with disabilities have access to the variety of educational programs and services available to non-disabled pupils including nonacademic and extracurricular services and activities." Ibid.

46. This current Local Plan also provides that it is the "policy of the ESUHSD that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled. Special classes, separate schooling, or other removal of children with disabilities from the general educational environment, occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." p.2[.]

47. These requirements for a Free Appropriate Public Education, participation in regular educational programs and that this education be in the Least Restrictive Environment are required by federal law. 20 U.S.C. §§ 1400, 1412, the law of California, California Education Code §§ 5600, 56361 and the regulations issued pursuant to those laws.

48. The application for the Local plan for Special Education 1999-2002, (THE PLAN) was signed on various dates between May 27, 1998 and June 26, 1998. It was extended to June 30, 2003. It contains a "CERTIFICATION OF PARTICIPATION, COMPATIBILITY, AND COMPLIANCE ASSURANCES (34 CFR 300L.228-231, 236-237, 239)" (CERTIFICATION FORM) in which Defendant Colleen Wilcox signed the following Certification of Assurances: "I certify, 1) that this plan has been adopted by the appropriate local board(s) (district/county) and is the basis for the operation and administration of special education programs; and 2) that the agency(ies) herein represented will meet all applicable requirements of state and federal laws and regulations, in-

cluding general compliance with Public Law 94-142 [29 U.S.C. § 1400 et seq.], Section 504 of Public Law 93-112[29 U.S.C. § 794], and the provisions of the California Education Code, Part 30. (See specific assurance statements, Section C. on the back of this form.)" Excerpts from THE PLAN are in A-3)[.]

49. The regulations on the back of the CERTIFICATION FORM include: "Reg. 300.224 Personnel development[.] Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under Reg. 300.140 (20 U.S.C. 1414(a)(1)(C)(i))" (A-3, p. 1.2)[.]

50. These regulations also include: "Reg. 300.227 Participation in regular educational programs (a) Each application must include procedures to ensure that to the maxim [sic] extent practicable . . . the local educational agency provides special services to enable handicapped children to participate in regular educational programs." (Ibid.)

51. Under THE PLAN, SCCOE is the Responsible Local Agency (RLA), which is "designated by [California] Education Code 56032 to receive and distribute regional funds for the Local Plan, provide for administrative support, and coordinate the administration of the Plan." (A-3, p. 11.5).

52. THE PLAN says that SCCOE "provides programs that the districts do not offer, including special education programs for infants and pupils requiring intensive services. The County and the districts maintain responsibility for their own programs." (A-3, p. 11.1)[.]

53. THE PLAN says that the California "Education Code Section 56602 requires the provision of information for evaluation, which includes, but is not limited, to the following: . . .

a. "Special evaluation studies of statewide impact.

b. "Pupil Performance.

c. "Placement of pupils in least restrictive environments. . . . "

It further provides that:

" . . . the RLA have the information and the system to provide information as it is requested." (A-3 at p. 112-9)[.]

54. Under THE PLAN, SCCOE, as the RLA, and the SELPA, whose director is hired by SCCOE, (A-3, p. 11.5) "accept the responsibility for assuring placement of disabled children into the appropriate least restrictive educational environment." (A-3, p. 11.7)[.]

55. THE PLAN repeats the requirement that services be provided in the least restrictive environment and specifically says that "all local education agencies are required to determine that:

a. "Program options in general education environments are available at local neighborhood schools.

b. "Special education programs, to the maximum extent appropriate to pupil needs, are housed on regular school campuses and dispersed throughout the district.

c. "The physical location of the program facilitates continuing social interaction with non-disabled pupils.

d. "Individuals with exceptional needs have equal access to all general education activities, programs, and facilities on the regular school site and participate in those activities as appropriate to their needs.

e. "Administrative policies and procedures encourage the close cooperation of all school personnel to facilitate opportunities for social interaction between individuals with exceptional needs and non-disabled individuals.

f. "Administrative policies and procedures allow individuals with exceptional needs maximum access to appropriate general education academic programs and school personnel are given necessary support to ensure the pupil's success.

g. "Through long-range commitments for physical housing on regular school campuses, individuals with exceptional needs are afforded opportunities to develop and maintain continuing relationships with non-disabled peers." (A-3, pp. III.1-III.2 & IV. 16-IV.17)[.]

56. A May 4, 2001 communication from the Santa Clara County Office of Education Human Resources Department SCCOE Silicon Valley Internship Program on the subject of Moderate to Severe Internship Standards 15-18 Response, was addressed to the California Commission on teacher Credentialing (CCTC). In this document the SCCOE said: "Supervision and support will be provided to all Interns by

experienced SCCOE special education teachers or Peer Assistance and Review (PAR) Consulting Teachers. Assignment will be made by the Student Services Program Representative and the Intern program. They will be assigned no more than four intern teachers with whom to work." (A copy of what qui tam plaintiff believes is this May 4, 2001 letter is in Appendix A-4[.])

57. The qui tam plaintiff requested a copy of this May 4, 2001 communication under the California Public Records Act. The SCCOE wrote on June 10, 2003: "Neither my staff in Human Resources ("HR") nor the instructional services branch ("ISB") staff were able to find the record you are referring to dated May 4, 2001 to the CCTC. Although your request states that the record was regarding standards 15-18, there is no such document available."

58. The June 10, 2003 SCCOE statement indicates a copy of this June 10 response went to Mary Mulholland, Director of Human Resources, who, the qui tam plaintiff believes, was one of the signers of the May 4, 2001 communication to the CCTC. See A-4 signature page.

59. In the Intern Agreement relating to the qui tam plaintiff, the SCCOE agreed with San Jose State University and the qui tam plaintiff to the following terms on December 21, 2001: (This Intern Agreement is in Appendix A-5).

a. "1. The intern has been assigned to a special education teaching position appropriate to the credential sought. Employment of the intern does not displace a certificated employee in my district.

b. 2. A support provider identified by the principal or administrator will be assigned to assist the intern during the first year of the internship.

c. "4.[sic] My district agrees to pay the intern full salary during the internship."

60. The State of California's assurances to the federal government, which were required in order for the State to receive federal funds for education, were false if these statements by the Defendants were false.

61. Copies of these assurances and other assurances by the defendants will be provided by the governmental plaintiffs when they enter the case and/or by the qui tam plaintiff, after discovery, if necessary.

VII[.] STATUTORY AND REGULATORY REQUIREMENTS INCLUDED IN THE CERTIFICATION FORM'S PHRASE "APPLICABLE REQUIREMENTS OF STATE AND FEDERAL LAWS AND REGULATIONS"

62. Federal Laws include, but are not limited to:

a. Section 504 of Public Law 93-112, 29 U.S.C. § 794, which is quoted at page VII-48 of THE PLAN: "No otherwise qualified individual with handicaps in the United States shall, solely by reason of her or his handicap, as defined in Section 706(8) of this title, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity

conducted by any Executive agency or by the United States Postal Service."

b. Public Law 94-142, 20 U.S.C. § 1400 et seq., as amended, known as the "Individuals with Disabilities Education Act" (IDEA), [and]

c. The No Child Left Behind Act of 2001, Public Law 107-110, January 8, 2002, (20 U.S.C. § 6301 and various other sections of the U.S.C.) which, according to a speech by U.S. Secretary of Education Rod Paige on July 8, 2002, ". . . includes blind children and other students with disabilities."

63. Federal regulations include, but are not limited to:

a. 34 CFR Part 200

b. 34 CFR Part 300

as they existed on all relevant dates.

64. California laws include, but are not limited to, the California Education Code (EDUCATION CODE), including:

a. The finding that "all individuals with exceptional needs have a right to participate in free appropriate public education. . . . " EDUCATION CODE §5600[.]

b. "Education programs are provided under an approved local plan for special education that sets forth the elements of the programs in accordance with this part." EDUCATION CODE § 56001(f).

c. "Individuals with exceptional needs are offered special assistance programs that pro-

mote maximum interaction with the general school population in a manner that is appropriate to the needs of both. . . . " EDUCATION CODE § 56001(g)[.]

d. "Appropriate qualified staff are employed, consistent with credentialing requirements, to fulfill the responsibilities of the local plan. . . ." EDUCATION CODE § 56001(n).

e. "Regular and special education personnel are adequately prepared to provide educational instruction and services to individuals with exceptional needs." EDUCATION CODE § 56001(o)[.]

f. "Special education is an integral part of the total public education system and provides education in a manner that promotes maximum interaction between children or youth with disabilities and children or youth who are not disabled, in a manner that is appropriate to the needs of both." EDUCATION CODE §56031[.]

g. "Each special education local plan shall ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related service, as required by the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.) and federal regulations relating thereto." EDUCATION CODE § 56360.

h. "The continuum of program options shall include, but not necessarily be limited to, all of the following or any combination of the following: (a) Regular education programs consistent

with subparagraph (A) of paragraph (5) of subsection (a) of Section 1412 of Title 20 of the United States Code and implementing regulations. * * *" EDUCATION CODE § 56361[.]

i. The Teacher Education Internship Act of 1967, EDUCATION CODE §§ 44450-44468 including "A school district shall give special supervision and assistance to each intern above and beyond that given to other newly certificated and newly employed school personnel."

j. "No one shall be employed to supervise the work of teachers for more than half time during any school week unless he is the holder of a valid teacher's certificate authorizing him to teach in the schools and classes in which he is to supervise instructions and a valid supervision certificate." EDUCATION CODE § 44870[.]

k. "[A]ppropriate personnel in the employing school district shall counsel with the intern and a total program . . . shall be planned. The county superintendent of schools shall be involved in the program planning in the case of a joint recommendation." Education Code § 44457[.]

l. Interns are required to be assisted and guided by a mentor or certificated employee selected through a competitive process. These mentors or other certificated employees must be an employee of the district hiring the intern and "shall possess valid certification at the same level, or of the same type, of credential as the

district interns they serve." Education Code § 44830.3(a).

m. "The program shall meet the instructional or service needs of the district with the primary objective being to increase the effectiveness of the intern in the district.["] Education Code § 44458[.]

n. "The supervisory help and guidance of interns as they pursue their school district responsibilities are important for the success of such programs. . . . [S]chool districts, and county superintendents of schools in the case of joint recommendations, may enter into agreements with colleges and universities for the employment of staff for such supervision." Education Code § 44461[.]

o. "A school district shall give special supervision and assistance to each intern above and beyond that given to other newly certificated and newly employed school personnel." Education Code § 44465[.]

p. The "internship credential shall be issued initially for a two-year period. . . . " Education Code § 44455[.]

q. "The superintendent of the school district or the superintendent's designee shall give 30 days' prior written notice of dismissal, not later than March 15 in the case of second year probationary employees. The notice shall include a statement of the reasons for the dismissal and notice of the opportunity to appeal." Education Code § 44948.3(a)(1).

65. Regulations of the State of California include, but are not limited to: Title 5 of the California Code of Regulations (CCR).

VIII[.] ACTIONS BY THE DEFENDANTS THAT MADE THEIR STATEMENTS FALSE

66. The following actions demonstrate that the statements referred to above by the defendants were false at the time they were made, either because they constituted representations of fact that were not true or representations of what defendants intended when they had no such intentions as evidenced by their future actions.

67. In contrast to their statements promising to meet all applicable requirements of state and federal laws and regulations, and the assurance of the SCCOE in the Intern Agreement relating specifically to the qui tam plaintiff that the intern "has been assigned to a special education teaching position appropriate to the credential sought," the qui tam plaintiff was required to obtain an intern credential for Moderate/Severe. (A copy of this Intern Agreement is attached as A-5[.])

68. The appropriate credential for the position to which he was assigned was Mild/Moderate because the students in the Foothill Pilot Program were generally of average or higher intelligence and none of them fit in the traditional categories of Moderate/Severe, which include such conditions as autism and mental retardation.

69. The Moderate Severe program put time pressures on the qui tam plaintiff that prevented his teaching of students with emotional disability but average or higher intelligence, for example: an as-

sessment class relevant to the type of students in the Foothill Pilot Program, and a class in teaching reading to students with reading difficulties.

70. The principal under whom the qui tam plaintiff worked during the 2001-2002 school year told the qui tam plaintiff that the appropriate credential was the special education mild to moderate, not moderate to severe, but suggested he would wait until later to try to get that changed. This principal retired in the summer of 2002.

71. Defendant David Wong became the principal to whom the qui tam plaintiff reported in the summer of 2002. One of the first items that this principal commented on was the need to assess the students, but the qui tam plaintiff was advised by his intern advisor at San Jose State University that the appropriate assessment course for the type of students the qui tam plaintiff was teaching was not included in the Moderate/Severe intern program in which he was participating. She said that course was in the Mild/Moderate program.

72. The qui tam plaintiff advised Defendant David Wong of this and talked with him about the assessment course, but David Wong, to the best of the qui tam plaintiff's knowledge, did nothing to change the qui tam plaintiff into the more appropriate Mild/Moderate program.

73. At least one of the teachers in the portables where qui tam plaintiff was teaching had only an emergency education specialist instruction permit, authorized for "Mild/Moderate Disabilities." This credential required six semester units per year for it to be renewed in contrast to the approximately

thirty-nine credits that the qui tam plaintiff was supposed to complete in two years. But the six credits the emergency permit teacher was required to take included the assessment course that the qui tam plaintiff would have taken if he had been in the Mild/Moderate intern program.

74. This teacher, with only an emergency credential, replaced the qui tam plaintiff when the qui tam plaintiff was not rehired.

75. Despite the assurance given by the SCCOE that "Supervision . . . will be provided to all Interns by experienced SCCOE special education teachers. . . ." (May 4, 2001)(A-4), as required by EDUCATION CODE §44870, and despite EDUCATION CODE § 44465's requirement that "A School district shall give special supervision and assistance to each intern above and beyond that given to other newly certificated and newly employed school personnel", the SCCOE has admitted in its June 10, 2003 response to the qui tam plaintiff's request for public records that "There is no supervision piece in the Intern Program with the SCCOE."

76. In this response to the qui tam plaintiff's request for public documents the SCCOE later said: "Your principal is your supervisor and evaluator."

77. According to the CCTC website for checking the credentials of teachers, Defendant David Wong has neither a Moderate/Severe nor a Mild/Moderate credential.

78. SCCOE says that EDUCATION CODE § 44870 "is referring to personnel that are not principals" but that section says "No one shall be employed to supervise the work of teachers for more than half the

time during any school week unless he is the holder of a valid teacher's certificate authorizing him to teach in the schools and classes in which he is to supervise instruction and a valid supervision certificate." (emphasis added.) This does not say "No one other than principals." Moreover, this requirement is for another certificate in addition to the supervision certificate.

79. In any event, any supervision by Defendant David Wong does not satisfy the assurance of the SCCOE that the qui tam plaintiff would be supervised by someone with the proper credential as required by the SCCOE's assurances in the May 4, 2001 communication and reinforced by EDUCATION CODE § 44465.

80. Despite the SCCOE commitment in the Intern Agreement relating specifically to the qui tam plaintiff that "A support provider identified by the principal or administrator will be assigned to assist the intern during the first year of the internship," and the assurance in the May 4, 2001 communication that ". . . support will be provided to all Interns by experienced SCCOE special education teachers. . . .", the SCCOE has not indicated any such support was given the qui tam plaintiff in his first year as an intern which started on January 2, 2002.

81. Indeed, SCCOE says the qui tam plaintiff's Support Provider was Cathie Colson, but the log of her activity with respect to providing support to the qui tam plaintiff shows her first attempt to visit his site was 12/19/02 but says she was unable to reach him because the portable area was flooded.

82. The Foothill Pilot Program (High School) never had to cancel any classes due to flooding while the qui tam plaintiff was teaching there.

83. The site visit she made on January 8, 2003, which was the first time she talked to the qui tam plaintiff, was reported in her log as "Observed John for 10 minutes, conferenced [sic] for 30 minutes. Teaching Eng,. Govt, Math, Science, PE (some mainstreamed for history &/or PE). Concerns expressed – hasn't received texts – keyboarding needs switch to connect to internet.[]"

84. This was more than a year after the qui tam plaintiff became an intern; the only time he saw her in the classroom; and she never communicated with him again.

85. Her log also reports that she exchanged E-mails with Defendant David Wong in January and was told on January 15 that "he [Defendant David Wong] is "ready to evaluate John out."

86. Defendant David Wong did not conduct his "Second Formal Evaluation" until February 13, 2003.

87. After the first page of Cathie Colson's log, including an entry on 3/14/03 saying that the qui tam plaintiff was not staying in the program, a second page adds another item for 1/8/03 saying "Possible areas to improve – had detailed plans for the day but didn't stick to them. Doesn't seem to have long range plans for semester."

88. Cathie Colson never told the qui tam plaintiff that he should not be flexible in connection with the daily schedule and gave him no suggestions for long-range plans for this class.

89. In fact, no one ever gave him any guidance about the subjects to be covered in this class.

90. Even teachers who are not interns, both regular education and special education teachers, are supposed to be given staff development. Education Code §§ 56240-56245. In particular, "regular education teachers serving individuals with exceptional needs [are to be provided] appropriate training each year relating to the needs of those individuals." Education Code § 56243.

91. A ten-minute observation and a brief conference more than a year after the qui tam plaintiff became an intern does not satisfy either the promises made by SCCOE or the California law regarding extra support for intern teachers.

92. During the fall of 2002, Defendant David Wong initially refused permission for the qui tam plaintiff to visit two other high school classes, which was required for a special education course the qui tam plaintiff was taking at San Jose State University in the intern program.

93. Only after the qui tam plaintiff complained to the SCCOE intern program director, did Defendant David Wong permit the qui tam plaintiff to make the required visits.

94. Despite the assurances that SCCOE gave about complying with the federal and state laws, and the requirements of these laws to provide a "free appropriate public education" in the "least restrictive environment" including not depriving handicapped persons of the benefits of a program receiving federal financial assistance, Defendant David Wong prevented the qui tam plaintiff from ordering student

copies of the government text that was being used in the ESUHSD until approximately half way through that course.

95. Although the qui tam plaintiff explained to Defendant David Wong in the summer of 2002, during or about the last week of July, that he had been told by the SCCOE that texts to be used could be those that were used in the school district where his site was located and that the text he wished to order was being used in ESUHSD, David Wong refused to discuss this. He said that would have to wait until he held a curriculum meeting with the qui tam plaintiff and the other two special education teachers under his supervision at the Foothill site. That meeting never happened.

96. In the fall of 2002 the qui tam plaintiff requested three $29.95 student copies of a text to use in conjunction with teaching a course in computer applications for the Apple computers that were located in the classroom.

97. Defendant David Wong turned this request down without notifying the qui tam plaintiff until he inquired about what had happened to the order. When asked about this, Defendant David Wong, on or about November 22, 2002, again said that order would have to wait until he had a meeting with the qui tam plaintiff about the curriculum.

98. In the meantime Defendant David Wong said to stop teaching the computer course until this meeting was held.

99. He subsequently met with the qui tam plaintiff on or about December 2, 2002 and promised to get

the books, but the qui tam plaintiff never received these books.

100. The qui tam plaintiff also requested, on numerous occasions, that the Apple computers located in the classroom be connected to the Internet so the students could learn how to use that resource.

101. The qui tam plaintiff believes that the students in the other portables under Defendant David Wong's authority at the Foothill site had such connections available and that the students in the ESUHSD alternative school on whose grounds the Foothill Pilot Program (High School) was located had such connections.

102. Nevertheless, despite repeated requests to Defendant David Wong and conversations with technology specialists in SCCOE and ESUHSD and complaints to the "Support Provider" who saw the qui tam plaintiff in January, 2003, these connections, like the computer texts, were never made available for the qui tam plaintiff's students.

103. Another part of the federal and state laws that applies to special education students as well as to students in general education is that the schools be accountable for educating the students.

104. There are a number of tests that can be reviewed for this accountability including statewide testing referred to as "STAR Tests." Other tests that may be relevant to this are the proficiency tests that school districts use to see that their students meet graduation requirements and the California High School Exit Exams which were given in the 2002-2003 school year to students expecting to graduate in 2004 or thereafter.

105. When the qui tam plaintiff inquired about the exit exam for one of his students in the fall of 2002, Defendant David Wong said he did not know about the exit exam and implied that the qui tam intern teacher should have told him about it earlier. As a result that student was not allowed to take the exit exam in the fall of 2002.

106. Another student was a senior and scheduled to graduate in 2003 if he passed the East Side Union High School proficiency test. Defendant David Wong gave no effective support to the qui tam plaintiff to get this test. The qui tam plaintiff finally obtained it in time to be given, but on or about the time of its administration, Defendant David Wong criticized him for spending the time to get this test.

107. When the qui tam plaintiff tried to get the exit exam in the spring of 2003 for the student who was not allowed to take it in the fall of 2002, the Defendant gave very little, if any, support and told the qui tam plaintiff that this student would not be able to pass it.

108. The qui tam plaintiff obtained the test from another school district at the end of February 2003 and the student passed both parts of the exam the first week of March.

109. The giving of this exam has since been suspended because the Department of Education had decided that, in view of the large number of failures, the students were not getting enough preparation to take it.

110. When the Star Testing was administered in the spring of 2003, the materials given to special education teachers under Defendant David Wong's super-

vision at the Foothill site did not include all parts of the tests. The qui tam plaintiff was able to obtain the missing part for one of his students who lived outside the ESUHD [sic], but he was instructed by Defendant David Wong that he should not try to obtain the missing part for any students living in the ESUHSD.

111. The qui tam plaintiff understands that Defendant David Wong also instructed the Teacher in Charge, who was obtaining the materials from ESUHSD for the David Wong Classrooms, not to request the missing materials for the classes under David Wong's jurisdiction at the Foothill site.

112. Defendant David Wong explained that he was having a discussion as to whether the ESUHSD or the SCCOE should be supplying this test which is used to measure the accountability for the educational program. Defendant David Wong believed the ESUHSD should provide these tests, which presumably means that ESUHSD would be held accountable for the students the SCCOE is teaching for that District.

113. This is contrary to THE PLAN, which provides that "The County and the districts maintain responsibility for their own programs." (A-3 p. 11.1)[.]

114. Because of all the above actions by the County Defendants, the students in the Foothill Pilot Program (High School) have not been receiving the "Free Appropriate Public Education" to which they are entitled under state and federal law and for which the County Defendants received public funds.

115. During the fall of 2002, the qui tam plaintiff tried to get the Defendant principal David Wong and the Defendant ESUHSD to make clear what the re-

quirements were for graduation for the senior referred to above who took the proficiency test. Defendant David Wong said that was the responsibility for the Program Specialist, an employee of the ESUHSD.

116. On or about October 1, 2002 the Program Specialist refused to discuss these graduation requirements in an IEP meeting and said this was not an appropriate topic for an IEP meeting. Later she and the Defendant David Wong claimed that they were working on the problem, but the student was not allowed to attend any graduation ceremony and has not yet received a diploma.

117. The senior referred to did pass the proficiency test and neither the qui tam plaintiff nor, to the best of his knowledge, the senior received any information that he had not passed more than enough credits in the appropriate subjects to satisfy the graduation requirements.

118. When the parents of the student asked the qui tam plaintiff about this in August, 2003, he called personnel in the SCCOE and the director of Special Education in ESUHSD.

119. They both said that the responsibility for sorting out the diploma problem is that of Defendant David Wong.

120. The qui tam plaintiff left a message on Defendant David Wong's voice mail in August asking about the diploma for this senior but the call was never returned.

121. Because of the above actions or inaction by the County Defendants and the ESUHSD, the senior has

been deprived of what he is entitled to under federal and state laws and regulations despite the fact that both the County Defendants and Defendant ESUHSD received public funds to educate this student who resided in the ESUHSD during the time he completed his requirements for graduation.

122. Another senior, who resides in the ESUHSD, completed his graduation requirements during the summer of 2003, but he has also not received his diploma.

123. In addition to this clear violation of failing to provide the benefits of a "Free Appropriate Public Education" to these seniors, Defendants SCCOE and the ESUHD [sic] located the Foothill Pilot Program (High School) where the students are not in the least restrictive environment.

124. The Foothill Pilot Program (High School), along with the special education classes under Defendant David Wong's jurisdiction in the two adjacent portables, (the David Wong Classrooms) appear to be included in THE PLAN as SED Special Classes within the East Side Union High District, "Other Operated" (A-3 p. III.12).

125. The David Wong Classrooms are not located on the campus of a general education high school but are located on the grounds of an alternative school called the Foothill High School. ESUHSD describes alternative education as fol ows: "Alternative Education is an option for students who are not finding success in the traditional high school." (See ESUHSD website http://www.esuhsd.org/schools.html at "Information (fh)")[.]

126. The Teacher in Charge in the David Wong Classrooms has emphasized that the students in these classrooms are not to be allowed on the main grounds of the alternative school without being supervised. This requires that these teen-agers [sic] ranging in ages up to and including 18 must be escorted to and from the bathroom and to the area where they pick up their lunches, which are eaten back in the area exclusively used by the SCCOE for special education classes.

127. The qui tam plaintiff understands that this is at least in part because that is necessary to satisfy the principal of the Foothill Alternative School.

128. It is understood that this generally also means that there should be no socializing with the students in the alternative school.

129. In fact, during the qui tam plaintiff's tenure at the Foothill Pilot Program (High School) he has never seen any socializing between students in the David Wong Classrooms and the students in the ESUHSD alternative school.

130. The students that are full time in the David Wong Classrooms do not have access to the athletic facilities or extracurricular activities commonly available in general education high schools.

131. These facilities to which the students in the David Wong Classrooms do not have access include such athletic facilities as a track, gymnasium, weights, indoor basketball, and football and soccer fields. Extra curricular activities they have no access to include team sports, band, cheerleading, and various clubs.

132. The general high school education facilities at which students in the David Wong Classrooms can take general education classes are at a sufficient distance that special transportation is usually provided, and it is not feasible to take any classes there unless it is the beginning or the end of the day.

133. The submission of Local Plans from SELPA V that described the SCCOE special education programs operated on ESUHSD's Foothill campus was a joint venture, combination or conspiracy in which compliance with all appropriate laws and regulations was assured.

134. In fact, SCCOE and ESUHSD not only intentionally gave these false assurances upon which the funding was dependant [sic], but they conspired to violate the laws guaranteeing a free appropriate public education in the least restrictive environment by locating this special education program on an alternative school campus and prohibiting any social contact between the special education students and the alternative school students.

135. The wrongful acts and omissions described in paragraphs 115 through 134 are attributable to both the County Defendants and ESUHSD and any such acts of any defendants shall be deemed to be the act of each defendant acting individually, joint, or severally. Each of the defendants participated in and received funds as a result of the conspiracy alleged herein.

IX[.] THE QUI TAM PLAINTIFF'S COMPLAINTS ABOUT THE LACK OF SUPPORT

136. In addition to the requests for support addressed to Defendant David Wong, the qui tam

plaintiff sent written complaints about the lack of support he was receiving on at least three different occasions (on or about September 9, 2002, February 23, 2003 and March 9, 2003) with copies to Defendant Joe Fimiani, the compliance officer for SCCOE.

137. On the last written complaint about the lack of support the qui tam plaintiff specifically listed some of the laws and commitments that had been violated with citations to specific statutes.

138. This complaint also specifically referred to some of the damages that might be attributable to the lack of support the qui tam plaintiff had received. Consequently, SCCOE was aware that the qui tam plaintiff was considering litigation based on the Defendants' violations of law.

139. Despite Defendant Joe Fimiani's role as compliance officer for the complaint procedure about violations of law under Title 5 CCR §4630(a), the qui tam plaintiff never received any response from Defendant Fimiani.

140. The agency at the state level responsible for the intern programs is the California Commission on Teacher Credentialing and a copy of this last complaint was also sent to Dr. Sam W. Swofford, Executive Director, California Commission on Teacher Credentialing, 1900 Capitol Avenue, Sacramento, CA 95814.

141. The qui tam plaintiff received no response from the State of California.

142. During the course of the year the observations that a general education elementary teacher assigned to mentor the qui tam plaintiff never resulted

in any suggestion that the qui tam plaintiff was doing an unsatisfactory job.

143. Quite the contrary, the notes this mentor teacher took on her observations of the qui tam plaintiff were quite favorable.

144. Defendant David Wong's first evaluation of the qui tam plaintiff, on or about October 10, 2002, noted that he was a beginning teacher and suggested areas for improvement but did not indicate the qui tam plaintiff's teaching was unsatisfactory.

145. Defendant David Wong's evaluation on February 13, 2003 (almost a month after he had told Cathie Colson that he was "ready to evaluate John out") said the qui tam plaintiff's performance was unsatisfactory but provided no specific exemplars where progress was not evident and made no specific recommendations to assist with improvement as required by the Scheduled Observation form.

146. The only specific suggestion Defendant David Wong ever gave the qui tam plaintiff was that a student with reading difficulty should not be given books written in the first person to read because it was easier to read books in the third person.

147. Neither the qui tam plaintiff's mentor teacher nor his professors in teaching reading and methods at San Jose State University have ever heard of this alleged advantage of books written in the third person over books written in the first person. As one of his San Jose State professors told the qui tam plaintiff, "What is found, over and over again, is that the books need to be interesting to the reader." The book the student was reading was about a boy his age in a sailboat lost in the ocean.

148. The qui tam plaintiff requested a formal scheduled classroom observation by an administrator other than David Wong. This observation occurred on March 23, 2003.

149. The other administrator, another principal of special education programs run by SCCOE, did not rate the qui tam plaintiff unsatisfactory in any category and instead checked "emerging" or "applying" on all categories he observed. These categories are both higher than the "beginning" category that David Wong has used in his fall 2002 observation.

150. Specific comments by this other principal included: "positive classroom environment; reflects what's being taught; behavior standards posted; objectives of the lesson were clear; traditional strategies used [including] read aloud; board work; time lines; lecture; worksheets; visuals used[;]" He also reported "referenced previous learning; clarified terms; good use of questioning strategies; adjusted assignments for kids; kept walking around; positive reinforcement [with] verbal; chips; agreements."

151. Nevertheless, the qui tam plaintiff was not reelected.

152. The qui tam plaintiff believes he was not reelected because he had raised too many complaints about the lack of support he had been given by Defendant David Wong. The subject of these complaint [sic] was the harassment of the qui tam plaintiff by David Wong, forcing the qui tam plaintiff to participate in the fraudulent activity of purporting to educate students under conditions imposed by the County Defendants that prevented these students from getting a free appropriate public education.

153. When the qui tam plaintiff raised a question with Human Resources about why he was being sent a "non-reelection" letter, he was told that the SCCOE did not have to give any reason and refused to discuss the matter.

154. However, in the response to the qui tam plaintiff's request for documents, the SCCOE said: "The Education Code allows any school district or County office to non-reelect any probationary, provisional, temporary or intern teacher if there is not a strong match between the person and the organizations [sic] standards up to March 15th of their second full year of service." June 10, 2003 letter from SCCOE to the qui tam plaintiff, p. 1.

155. No citation was given for this statement. No evidence was ever given the qui tam plaintiff indicating that there was not a strong match between him and the SCCOE standards.

156. There is no provision in the Education Code that requires a "strong match between the person and the organizations [sic] standards" before an intern is re-elected. The observation reports by his mentor teacher and by the second principal to observe him indicated he was meeting the standards of the SCCOE.

157. March 15th of the second full year of service would permit an intern who was initially hired at the beginning of a school year to complete the intern program within the prescribed two years.

158. The qui tam plaintiff was not hired until the middle of the school year. Consequently, a notice by March 15 not to continue the next school year prevented him from having a second full year of service,

which is required for him to complete his internship within the allotted time of two years.

159. Both the SCCOE human resources spokesperson and a union representative suggested the qui tam plaintiff might consider resigning so he would not have "non-reelected" on his record.

160. The qui tam plaintiff believes this was an attempt to forestall litigation.

161. This is also a recognition by the Defendant SCCOE that "non-reelected" is something different from the expiration of a contract.

162. Defendant SCCOE wrote to the qui tam plaintiff on or about August 5, 2003 that he is not eligible for substitute teaching in the SCCOE because he was not re-elected.

163. Subsequent to that letter, the qui tam plaintiff was offered and did substitute three days, but it appears doubtful that he will get any further calls to substitute for the SCCOE.

164. If the SCCOE had just let the contract expire by its own terms the qui tam plaintiff would have been able to substitute for the SCCOE. In the spring of 2001, the qui tam plaintiff had worked for the SCCOE and was not rehired for the following year because the class he was teaching was not being offered the next year, but he did a substantial amount of substituting for the SCCOE after the end of the class he was teaching until he was hired for the special education teaching position that is described in this complaint.

165. Other consequences of not being re-elected are that the qui tam plaintiff:

a. was told by the Defendant SCCOE in a letter dated March 20, 2003[,] that he would not be considered in the open transfer process within SCCOE,

b. was not told in the notice relating to the expiration of his contract "This in no way reflects upon the quality of your services as an employee of the Santa Clara County Office of Education," as he was when his January 2002 contract expired on June 30, 2002.

c. was told he was ineligible to apply for other teaching positions in the SCCOE as a result of his being non re-elected.

166. When the qui tam plaintiff was previously notified that he would not be working beyond the semester he was then teaching for SCCOE, he was allowed to:

a. participate in the transfer process, as he did in the spring of 2002,

b. teach both as a substitute, as he did beginning July 1, 2001, and later, full-time for the SCCOE as he did beginning in December 2001, or

c. continue in his full-time SCCOE teaching position, as he did beginning July 1, 2002.

167. Although the qui tam plaintiff was able to obtain a summer job, he has not been able to obtain full-time employment.

168. At least some of the school districts to which the qui tam plaintiff has applied, hired individuals that already had their full credentials.

COUNT I

(County Defendants)

Violations of False Claims Act, 31 U.S.C. § 3729(a)(1), (a)(2) with respect to the Foothill Pilot Program

169. Paragraphs 1-168 are hereby incorporated by reference.

170. From June 1998 through the present, the County Defendants knowingly (as defined in 31 U.S.C. § 3729(b)) made, used or caused to be made or used documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and other reports and assurances containing false or fraudulent statements regarding eligibility and compliance with all applicable requirements of state and federal laws and regulations, in order to get funds paid or approved by the United States Department of Education pursuant to County Defendants' participation in federal programs for the support of education, particularly for the support of the education of students with special needs.

171. These statements resulted in the California Department of Education representing to the United States Department of Education that all laws and regulations were being complied with in order to receive money from the federal government that ultimately went to the County Defendants.

172. In fact, all relevant laws and regulations were not being complied with.

173. By reason of the foregoing, County Defendants presented or caused to be presented to the United States, false claims for payment.

174. Based on the foregoing acts, the United States has paid claims and sustained damages in excess of $185,000 paid pursuant to County Defendants' participation in Federal Local Assistance for the Foothill Pilot Program (High School) for education programs funded by the Department of Education and an additional undetermined amount, estimated to be about $72,000 in connection with other programs funded by the United States Department of Education, for example training programs.

175. County Defendants are liable under the False Claims Act for three times the amount of approximately $258,000 plus a $5,000 to $10,000 civil penalty for each false claim presented or caused to be presented to the United States Department of Education, a portion of which will be awarded to the qui tam plaintiff. The County Defendants are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT II

(County Defendants and ESUHSD)

Violation of False Claims Act, 31 U.S.C. § 3729(a)(1), (a)(2) with respect to all the SCCOE Special Education Programs on the Foothill Campus

176. Paragraphs 1-168 are hereby incorporated by reference.

177. From at least June, 1998 through the present, County Defendants and Defendant ESUHSD knowingly (as defined in 31 U.S.C. § 3729(b)) made, used or caused to be made or used documents, including a

"Certification of Participation, Compatibility, and Compliance Assurances" and Local Plans for the provision of Special Education, and other reports and assurances, containing false or fraudulent statements regarding eligibility to receive federal funds, including false statements regarding compliance with all applicable requirements of state and federal laws and regulations.

178. These false or fraudulent statements were made to get funds paid or approved by the United States Department of Education pursuant to these Defendants' participation in federal programs for the support of education, particularly for the support of the education of students with special needs.

179. Contrary to their assurances, they did not comply with these laws and regulations, which include requirements to provide special education in the least restrictive environment with opportunities for these students to socialize with, and derive the same benefits as regular education students receive from a free appropriate pubic [sic] education, including graduation ceremonies, earned high school diplomas, access to special facilities and extra-curricular activities.

180. These statements resulted in the California Department of Education representing to the United States Department of Education that all laws and regulations were being complied with in order to receive money from the federal government that ultimately went to the County Defendants.

181. By reason of the foregoing, County Defendants and the ESUHSD presented or caused to be pre-

sented to the United States, false claims for payment.

182. Based on the foregoing acts, the United States has paid claims and sustained damages in excess of $640,000 paid pursuant to the participation of the County Defendants and Defendant ESUHSD in Federal Local Assistance for education programs funded by the Department of Education.

183. County Defendants and Defendant ESUHSD are liable under the False Claims Act for three times the amount of at least $640,000 plus a $5,000 to $10,000 civil penalty for each false claim presented or caused to be presented to the United States Department of Education, plus pre-judgment and post-judgment interest, a portion of which will be awarded to the qui tam plaintiff. The County Defendants and Defendant ESUHD [sic] are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT III

(County Defendants and ESUHSD)

Conspiracy to Violate False Claims Act, 31 U.S.C. § 3729(a)(3) with respect to all the SCCOE Special Education Programs on the Foothill Campus

184. Paragraphs 1-168 are hereby incorporated by reference.

185. From at least June, 1998 through the present, County Defendants and Defendant ESUHSD conspired to defraud the Government by getting false or fraudulent claims allowed or paid by knowingly (as

defined in 31 U.S.C. § 3729(b)) making, using or causing to be made or used documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and Local Plans for the provision of Special Education, and other reports and assurances containing false or fraudulent statements regarding eligibility, including false statements regarding compliance with all applicable requirements of state and federal laws and regulations, including the requirements to provide special education in the least restrictive environment with opportunities for these students to socialize with, and derive the same benefits as regular education students get from our free and public education system, including graduation ceremonies, earned high school diplomas and access to athletic facilities and clubs.

186. Contrary to their assurances, the defendants conspired to prevent the students in the David Wong classrooms from obtaining a free appropriate public education by placing these students in an environment that prevented them from associating with regular students, prohibiting them from associating even with the alternative school students and not permitting them to receive diplomas at graduation ceremonies with regular education students.

187. These false or fraudulent statements were made to get funds paid or approved by the United States Department of Education pursuant to these Defendants' participation in federal programs for the support of education, particularly for the support of the education of students with special needs.

188. These statements resulted in the California Department of Education representing to the United States Department of Education that all laws and

regulations were being complied with in order to receive money from the federal government that ultimately went to the County Defendants.

189. By reason of the foregoing, County Defendants and the ESUHSD presented or caused to be presented to the United States, false claims for payment.

190. Based on the foregoing acts, the United States has paid claims and sustained damages in excess of $640,000 paid pursuant to the participation of the County Defendants' [sic] and ESUHSD in education programs funded by the Department of Education, including the Federal Local Assistance program.

191. County Defendants and Defendant ESUHSD are liable under the False Claims Act for three times the amount of at least $640,000 plus a $5,000 to $10,000 civil penalty for each false claim presented or caused to be presented to the United States Department of Education, a portion of which will be awarded to the qui tam plaintiff. The County Defendants and Defendant ESUHD [sic] are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT IV

(County Defendants)

Violations of California False Claims Act, Government Code § 12650 et seq. including § 12651(a)(1), (a)(2) with respect to the Foothill Pilot Program

192. Paragraphs 1-168 are hereby incorporated by reference.

193. From June 1998 through the present, the County Defendants knowingly (as defined in Government Code § 12650(b)(2)) made, used or caused to be made or used documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and other reports and assurances containing false or fraudulent statements regarding eligibility to receive state and county funds. These statements regarded compliance with all applicable requirements of state and federal laws and regulations.

194. These false or fraudulent statements were made to get funds approved by the State of California and to get funds from the State of California and Santa Clara County for the support of education, particularly for the education off [sic] students with special needs and the University Intern Program.

195. Contrary to their assurances they did not comply with these laws and regulations which include requirements to provide appropriately credentialed and supported teachers to give these students a free appropriate public education in the least restrictive environment with opportunities for these students to socialize with and derive the same benefits as regular education students receive from a free appropriate public education, including graduation ceremonies, earned high school diplomas, access to special facilities and extra-curricular activities.

196. By reason of the foregoing, County Defendants presented or caused to be presented to California and to Santa Clara County, false claims for payment.

197. Based on the foregoing acts, California and Santa Clara County have paid claims and sustained

damages in excess of $744,000 pursuant to County Defendants' participation in an educational program called Foothill Pilot Program (High School) funded in part with California State and Santa Clara County funds and an additional estimated $288,000 in connection with other programs funded with the same monies, for example training programs.

198. County Defendants are liable under the False Claims Act for three times an amount exceeding $1,032,000 plus up to $10,000 civil penalty for each false claim presented or caused to be presented to the State of California and Santa Clara County, a portion of which will be awarded to the qui tam plaintiff. The County Defendants are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT V

(County Defendants and ESUHSD)

Violation of California False Claims Act, Government Code[] § 12650 et seq. including § 12651(a)(1), (a)(2) with respect to all the SCCOE Special Education Programs on the Foothill Campus

199. Paragraphs 1-168 are hereby incorporated by reference.

200. From at least June, 1998 through the present, County Defendants and Defendant ESUHSD knowingly (as defined Government Code. § 12650(b)(2)) made, used or caused to be made or used documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and Local Plans

for the provision of Special Education, and other reports and assurances containing false or fraudulent statements regarding eligibility to receive public funds from the State of California and Santa Clara County, including false statements regarding compliance with all applicable requirements of state and federal laws and regulations.

201. These false or fraudulent statements were made to get funds paid or approved by the State of California and Santa Clara County, for Defendants' participation in programs for the support of education, particularly for support of the education of students with special needs.

202. Contrary to their assurances, the County Defendants and ESUHSD did not comply with the applicable laws and regulations, which include:

a. providing a free appropriate public education

b. in the least restrictive environment

c. with opportunities for these students to socialize with, and derive the same benefits as regular education students, including

    i. graduation ceremonies,

    ii. earned high school diplomas, and

    iii. access to special facilities and extracurricular activities.

203. By reason of the foregoing, County Defendants and the ESUHSD presented or caused to be represented to the State of California and to Santa Clara County, including its school districts, false claims for payment.

204. Based on the foregoing acts, the State of California and Santa Clara County, including its school districts, have paid claims and have sustained damages in excess of $2,560,000 paid pursuant to County Defendants' participation in education programs funded with public money from the State of California and Santa Clara County.

205. County Defendants and Defendant ESUHSD are liable under the False Claims Act for three times an amount in excess of $2,560,000 plus up to $10,000 civil penalty for each false claim presented or caused to be presented to be paid out of state and county funds, a portion of which will be awarded to the qui tam plaintiff. The County Defendants and Defendant ESUHSD are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT VI

(County Defendants and ESUHSD)

Conspiracy to Violate California False Claims Act, Government Code § 12650 et seq., including § 12651(a)(3) with respect to all the SCCOE Special Education Programs on the Foothill Campus

206. Paragraphs 1-168 are hereby incorporated by reference.

207. From at least June, 1998 through the present, County Defendants and Defendant ESUHSD conspired to defraud the State of California and Santa Clara County by getting false or fraudulent claims allowed or paid by knowingly (as defined in Government Code § 12650(b)(2)) making, using or causing to

be made or used, documents, including a "Certification of Participation, Compatibility, and Compliance Assurances" and Local Plans for the provision of Special Education, and other reports and other assurances containing false or fraudulent statements regarding eligibility to receive state and county public funds for education, including false statements regarding compliance with all applicable requirements of state and federal laws and regulations.

208. These false or fraudulent statements were made to get funds paid or approved by the State of California and Santa Clara County for Defendants' participation in programs for the support of education, particularly for the support of the education of students with special needs.

209. Contrary to their assurances, the County Defendants and ESUHSD conspired to prevent the SCCOE special education programs on ESUHSD's Foothill alternative school campus from complying with the applicable laws and regulations, which include:

a. providing a free appropriate public education in the least restrictive environment

b. with opportunities for these students to socialize with, and derive the same benefits as regular education students, including

   i. graduation ceremonies,

   ii. earned high school diplomas, and

   iii. access to special facilities and extracurricular activities.

210. Based on the foregoing acts, the State of California and Santa Clara County, have paid claims and sustained damages in excess of $2,560,000 paid pursuant to the participation of the County Defendants' [sic] and ESUHSD in education programs funded with money from the State of California and Santa Clara County.

211. County Defendants and Defendant ESUHSD are liable under the False Claims Act for three times the amount of at least $2,560,000 plus up to $10,000 civil penalty for each false claim presented or caused to be presented to the State of California and Santa Clara County, a portion of which will be awarded to the qui tam plaintiff. The County Defendants are also liable for reasonable expenses necessarily incurred, plus reasonable attorneys' fees and costs of the qui tam plaintiff.

COUNT VII

(County Defendants)

Violation of Rights of the Qui Tam Plaintiff under the California False Claims Act, Government Code § 12653 (d)

212. Paragraphs 1-211 are hereby incorporated by reference.

213. From January 2002 to June 30, 2003, the qui tam plaintiff participated in the fraud of the County [D]efendants purporting to give a free appropriate public education to the students he was teaching. This participation was caused by the County Defendants harassing the qui tam plaintiff by having him work toward the wrong credential and refusing the qui tam plaintiff and his class the support and bene-

fits to which they were entitled under valid contracts and the laws and regulations of the State of California and the United States Government.

214. This fraudulent conduct of purporting to teach under circumstances that prevented the students from obtaining a free appropriate public education resulted in the County Defendants receiving money for providing a free appropriate public education that they did not provide.

215. Recognizing the fraud of teaching under these circumstances, the qui tam plaintiff complained. The consequence was that he was not reelected. If he had not been forced into participating in this fraudulent activity, there would have been nothing to complain about so his not being rehired is a direct consequence of his participation in the fraudulent activity.

216. If the qui tam plaintiff had refused to teach the students in the Foothill Pilot Program (High School) unless he was given the support to which he was entitled and to which the students were entitled as a free appropriate public education, the qui tam plaintiff would have been terminated from his position.

217. The qui tam plaintiff complained about this to some of the County Defendants beginning in September 2002,

a. first by a letter on or about September 9, 2002, copy to Defendant Fimiani;

b. by oral complaints to

   i. the qui tam plaintiff's mentor teacher,

ii. the therapist running the program in which the qui tam plaintiff was teaching, and

iii. the Special Education support person who met with the qui tam plaintiff in January 2003;

c. by an "Initial Written Response," dated February 23, 2003[,] with copies to Defendant Fimiani and to the SCCOE director of Human Resources. (This response was to the observation of the qui tam plaintiff by Defendant David Wong pointing out a number of areas in which the qui tam plaintiff had tried to provide a free appropriate education to his students despite Defendant David Wong's resistance.)

d. by a March 9, 2003 letter to Defendant Wilcox, with copies to Defendants Fimiani, and Wong and to the Executive Director of the CCTC[.] (This letter restated these complaints, citing some of the laws and rules that had been violated, and expressing a hope that litigation would not be necessary.)

218. The CCTC made no response to the qui tam plaintiff.

219. The County Defendants, which include the Compliance Officer, Defendant Fimiani, did not address the violations cited.

220. The qui tam plaintiff is voluntarily disclosing this information to the governments involved through the filing of this complaint and is prepared to assist in this litigation.

221. If the qui tam plaintiff had been reelected for the 2003-2004 year, he would have been at step 8 on the SCCOE teacher salary scale with special extra pay for having a doctorate. The salary for this position, including the doctorate amount and pay for the extended session which was held during the summer of 2003, is approximately $68,000. In addition, the cost of replacing the benefits package lost as a result of not being reelected exceeds over $5,000 and the loss of one year's pension accumulation over a 20-year retirement period is over $30,000 for a total of over $100,000.

222. The County Defendants are liable to the qui tam plaintiff under the California False Claims Act, Government Code 12653(c) and (d) for two times the amount of the damages sustained as a result of their actions, plus interest, litigation costs, reasonable attorney's fees and punitive damages.

COUNT VIII

(County Defendants)

Breach of Contract with and Fraudulent Misrepresentations to the Qui Tam Plaintiff

223. Paragraphs 1-222 are hereby incorporated by reference.

224. The County Defendants breached the following contracts with the qui tam plaintiff, or under which he was a third-party beneficiary.

225. The Santa Clara County Office of Education, San Jose State University Education Specialist Credential Moderate to Severe Disabilities Internship Program Intern Agreement Form was signed by the qui tam plaintiff and for SCCOE on December 12,

2001[,] and for San Jose State University on December 24, 2001. (A-5[.])

226. An Employment Contract with Santa Clara County Office of Education was signed for SCCOE on January 3 and by the qui tam plaintiff on January 7, 2002. (A-6[.])

227. An Employment Contract with Santa Clara County Office of Education was signed for SCCOE on June 10, 2002[,] and by the qui tam plaintiff on June 13, 2002. This contract was retyped to correct the job title and purportedly signed for the SCCOE on June 13, 2002, but not actually delivered to the qui tam plaintiff until later. He signed it on July 6, 2002. He started teaching under this 2002-2003 contract on July 1, 2002. (A-7[.])

228. Both of the above employment contracts were made expressly "subject to the laws of California and to the rules of the State Board of Education. . . ."

229. A letter to the California Commission on Teacher Credentialing from the Santa Clara County Office of Education signed for SCCOE on May 4, 2001[,] set forth some of the conditions the SCCOE agreed to in connection with its Moderate to Severe Internship program. (See A-4[.]) This letter was incorporated in the above employment contracts as part of compliance with the laws of California and the rules of the State Board of Education[.]

230. This letter from the SCCOE also constitutes a contract with the State of California under which the qui tam plaintiff is a third party beneficiary.

231. The qui tam plaintiff performed all his obligations to the County Defendants under these contracts.

232. By virtue of the conduct described above, including the violation of applicable statues, regulations and program provisions, the County Defendants breached these contracts.

233. In addition, by the requirement that the qui tam plaintiff enter a moderate/severe university program instead of a mild/moderate university program and by refusing to give him the supervision and support required by law, which was incorporated in the contract, the County Defendants fraudulently represented that the moderate/severe university program was the appropriate program and that the contract would be administered in accordance to all applicable law and regulations.

234. Relying on these fraudulent misrepresentations, the qui tam plaintiff took 28 credit hours of university courses in the moderate severe program and tried to give an education to his students despite the lack of proper supervision and support.

235. By reason of the foregoing, the qui tam plaintiff has suffered damages, in excess of $100,000, including, but not limited to being put in the wrong intern program, lack of the proper supervision and support in the intern program in which he was enrolled, and lack of support in teaching, which, because of his complaints, resulted in:

a. his not being reelected,

b. his not being able to obtain other employment, thereby losing salary and benefits,

c. his not being able to complete his intern program,

d. his being required to teach students who were

i. deprived of the support to which they were entitled, and

ii. who were not in the least restrictive environment, and

e. his emotional suffering.

236. The County Defendants are liable to the qui tam plaintiff for all these damages plus punitive damages and costs.

COUNT IX

(County Defendants)

For Not Continuing the Employment of the Qui Tam Plaintiff Long Enough to Give Him the Support and Supervision Required by the Public Policy to Have Well-Trained Teachers

237. Paragraphs 1-236 are hereby incorporated by reference.

238. The policy of having well-trained teachers is fundamental and substantial and is recognized in both federal and state statutory law.

239. "The Congress declares it to be the policy of the United States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others." 20 U.S.C. § 6301(a)(1).

240. Since 1988 it has been learned that "Intensive and sustained professional development for teachers . . . focussed [sic] on teaching and learning and on helping children attain high standards, is too often not provided." 20 U.S.C. [§] 6301(c)(5).

241. National Education Goals established in Congress provided that "By the year 2000, the Nation's teaching force will have access to programs for the continued improvement of their professional skills. . . . The objectives for this goals are that . . . (iii) States and school districts will create integrated strategies to attract, recruit, prepare, retrain, and support the continued professional development of teachers . . . so that there is a highly talented work force of professional educators to teach challenging subject matter; and (iv) partnerships will be established, whenever possible, among local educational agencies, [and] institutions of higher education . . . to provide and support programs for the professional development of educators." 20 U.S.C. § 5812(4)[.]

242. This is particularly important in special education where the Congress has found that "Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—. . . (E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them—(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and (ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible." 20 U.S.C. § 1400(c)(5)[.]

243. The United States House Committee on Education and the Workforce has recently repeated the need for special education teachers. "A continuing shortage of special education teachers . . . hinders the educational achievement of students with disabilities under current law. Both current and prospective special education . . . education [sic] teachers should have professional development to address the educational needs of students with disabilities." House Report 108-77, p. 85 (April 29, 2003).

244. The California Commission on Teacher Credentialing (CCTC), the body that provides funds for Intern Programs, wrote, in March 2003, that it was announcing the availability of funding Intern Programs to "meet California's need for credentialed teachers." Memorandum from the CCTC Executive Director dated March 4, 2003.

245. Statutory provisions in the Education Code establish the California public policy on interns and special education teachers. The California Teacher Education Internship Act of 1967 says it was enacted with the intent "to increase the effectiveness of teachers . . . in the public school of California. . . ." Education Code § 44451[.]

246. This policy is public in the sense that having properly trained teachers inures to the benefit of the public rather than merely serving the interest of individual teachers.

247. This policy has been in existence well before the qui tam plaintiff was forced to cease his employment in this case.

248. The discharge of the qui tam plaintiff before he was given the supervision and support to which he

was entitled was a violation of this public policy to have well-trained teachers.

249. By reason of the foregoing, the qui tam plaintiff has suffered damages, in excess of $100,000.

250. The County Defendants are liable for both compensatory and punitive damages, plus costs.

COUNT X

(County Defendants)

For Not Continuing the Employment of the Qui Tam Plaintiff For the Two-year Term of the Intern Program

251. Paragraphs 1-250 are hereby incorporated by reference.

252. Because an intern cannot continue in the Intern Program if he is not employed by a local educational agency that is working with the University, the failure to continue the employment of the qui tam plaintiff terminated him from the Intern Program.

253. Although an employer can insert a contractual provision in an employment contract to permit termination without cause, "it cannot do so in violation of public policy." *Daly v. Exxon Corporation*, 55 Cal. App. 4th 39, 44 (2nd App. Dist. Div. 6)[.]

254. Not permitting the qui tam plaintiff the right to complete the two-year Intern Program was a violation of public policy.

255. By reason of the foregoing, the qui tam plaintiff has suffered damages, in excess of $100,000.

256. The County Defendants are liable for both compensatory and punitive damages, plus costs.

COUNT XI

(County Defendants)

For Not Continuing the Employment of the Qui Tam Plaintiff Without Affording Him the Protections to Which He Was Entitled as a Probationary Employee

257. Paragraphs 1-256 are hereby incorporated by reference.

258. The qui tam plaintiff was an intern employee under Education Code § 44830.3[.]

259. The qui tam plaintiff had also completed service under a contract that expired June 30, 2002, but this contract was not for a full year[.]

260. The qui tam plaintiff was a probationary employee under Education Code § 44885.5.

261. "Non-reelection" is not the same as the mere expiration of a contract. (See paragraphs 159-166 above.)

262. In any event, when an employee is either not re-elected or dismissed in violation of public policy there is no distinction between a discharge and the expiration of a contract. *Daly v. Exxon Corporation*, 55 Cal. App. 4th 39, (2nd Dist, Div.6, 1997)[.]

263. The qui tam plaintiff, as a probationary employee, was entitled to a 30 day notice with a statement of the reasons for his not being continued in the employment plus a notice of the opportunity to appeal under Education Code § 44948.3(a)(1).

264. The requirement of 30 days notice with reasons for the action being taken is a mandatory duty on the County Defendants under the Education Code that

cannot be abrogated in an employment contract. *Welch v. Oakland Unified School District*, 91 Cal. App. 4th 1421 (1st App. Dist. Div[.] 2, 2001)[.]

265. The qui tam plaintiff was never given any reasons for his not being continued as an intern nor was he given any notice of an opportunity to appeal.

266. By reason of the foregoing, the qui tam plaintiff has suffered damages, in excess of $100,000.

267. The County Defendants are liable for both compensatory and punitive damages, plus costs.

WHEREFORE, Plaintiffs demand judgment as follows:

On Count I: judgment against the County Defendants, jointly and severally, and in favor of the United States for treble its damages, such civil penalties as are allowable by law, for pre-judgment and post-judgment interest, costs and other proper relief, including reasonable expenses of the qui tam plaintiff and his attorneys' fees and costs. A portion of the proceeds awarded to the United States, to be decided by the court, will also be awarded to the qui tam plaintiff.

On Counts II and III: judgment against the County Defendants and Defendant East Side Union High School District, jointly and severally, and in favor of the United States for treble its damages, such civil penalties as are allowable by law, for pre-judgment and post-judgment interest, costs and other proper relief, including reasonable expenses of the qui tam plaintiff and his attorneys' fees and costs. A portion of the proceeds awarded to the

United States, to be decided by the court, will also be awarded to the qui tam plaintiff.

On Count IV: judgment against the County Defendants, jointly and severally, and in favor of the State of California and Santa Clara County for treble their damages, such civil penalties as are allowable by law, for pre-judgment and post-judgment interest, costs and other proper relief, including reasonable expenses of the qui tam plaintiff and his attorneys' fees and costs. A portion of the proceeds awarded to the State of California and the County of Santa Clara, to be decided by the court, will also be awarded to the qui tam plaintiff.

On Count V and VI: judgment against the County Defendants and Defendant East Side Union High School District, jointly and severally, and in favor of the State of California and Santa Clara County for treble their damages, such civil penalties as are allowable by law, for pre-judgment and post-judgment interest, costs and other proper relief, including reasonable expenses of the qui tam plaintiff and his attorneys' fees and costs. A portion of the proceeds awarded to the State of California and the County of Santa Clara, to be decided by the court, will also be awarded to the qui tam plaintiff.

On Count VII: judgment against the County Defendants, jointly and severally, and in favor of the qui tam plaintiff for the relief necessary to make him whole, including reinstatement with the same seniority status that the employee would have had if his employment had been continued, two times the amount of back pay, including benefits, interest on the back pay, compensation for any special damage

he sustained and punitive damages plus litigation costs.

On Counts VIII, IX, X, and XI: judgment against the County Defendants, jointly and severally, and in favor of the qui tam plaintiff for the relief necessary to make him whole, including reinstatement with the same seniority status that the employee would have had if his employment had been continued, back pay, including benefits, interest on the back pay, and compensation for any special damage he sustained plus punitive damages, and[]

On all Counts: costs of suit including attorneys' fees and such further or additional relief as the court deems proper.

Dated: October 14, 2003 s/

John David Stoner on behalf of the United States Government, the State of California and Santa Clara County, and pro se
Address: 1050 Borregas Ave # 14 Sunnyvale, California 94089

DEMAND FOR JURY TRIAL

The plaintiffs hereby demand trial by jury as to all claims triable by jury.

Dated: October 14, 2003 s/

John David Stoner on behalf of the United States Government, the State of

California and Santa Clara County, and pro se
Address: 1050 Borregas Ave # 14 Sunnyvale, California 94089

[NOTE: APPENDIX TABLE OF CONTENTS AND ATTACHMENTS TO COMPLAINT OMITTED]

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Supreme Court U.S.
FILED
AUG 12 2008
OFFICE OF THE CLERK

No. 07-1336

IN THE

Supreme Court of the United States

COLLEEN V. WILCOX, et al.,

Cross-Petitioner,

v.

UNITED STATES ex rel.
JOHN DAVID STONER,

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether state officials are "person[s]" amenable to suit in their personal capacity under the False Claims Act.

2. Whether the Eleventh Amendment applies to a False Claims Act suit by a *qui tam* relator against state officials sued in their personal capacity if the United States declines to intervene in the suit.

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STATEMENT

1. The False Claims Act, 31 U.S.C. 3729 *et seq.*, is the government's primary tool for combating fraud against the federal Treasury. Among other things, the Act provides for civil penalties and damages to be assessed against "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government * * * a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). Suits to collect those civil penalties and statutory damages may be brought either by the Attorney General or by a private relator in the name of the United States, in an action known as a *qui tam* suit. See 31 U.S.C. 3730(a) and (b)(1); see generally *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); see also *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003). When a *qui tam* action is initiated, the government is given the opportunity to intervene and to take over the suit. 31 U.S.C. 3730(b)(2), (b)(4), and (c)(1). If the government declines to intervene, the relator conducts the litigation in the name of the United States. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in a recovery, the award is allocated between the government and the relator, regardless of whether the government intervened in the case. 31 U.S.C. 3730(d).

Congress intended the False Claims Act's terms to apply "broadly" in order "to protect the funds and property of the government from fraudulent acts" in whatever form they might appear. *Rainwater v. United States*, 356 U.S. 590, 592 (1958). Accordingly, in defining the "person[s]" subject to suit, "Congress wrote expansively, meaning to reach all types of

fraud, without qualification, that might result in financial loss to the Government." *Chandler*, 538 U.S. at 129.[1]

2. John David Stoner is a former employee of the Santa Clara County Office of Education (Santa Clara County), where he served from December 2001 through June 2003 as a teacher of students with severe disabilities. Pet. App. 24a, 55a-56a. In October 2003, he filed *pro se* a False Claims Act *qui tam* suit in the United States District Court for the Northern District of California against Santa Clara County, the East Side Union High School District (East Side District), and Santa Clara employees Colleen Wilcox, Joe Fimiani, and David Wong. His complaint alleged, *inter alia*, that, during his employment, he had witnessed actions by the defendants that made their certifications of the County's compliance with federal laws and regulations, including the Individuals with Disabilities Education, 20 U.S.C. 1400 *et seq.*, false. Those false certifications were undertaken to obtain disbursements of federal funds for certain educational programs, in violation of the False Claims Act. Although Stoner had raised those concerns with his employer during the 2002-2003 school year, they went unaddressed during his employment. *Id.* at 3a, 24a.

The district court dismissed the complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6),

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[1] Congress also enacted criminal penalties for the submission of false claims to the federal government. 18 U.S.C. 287.

on the ground that the defendants were not "person[s]" subject to suit under the False Claims Act. Pet. App. 23a-38a. Based on this Court's decision in *Stevens*, *supra*, which held that States are not "person[s]" amenable to suit under the False Claims Act, 529 U.S. at 778-788, the court held that neither Santa Clara County nor East Side District could be sued because, under Ninth Circuit law, they are considered to be arms of the State. Pet. App. 30a-36a. On that same basis, the district court held that the individual defendants could not be sued in their official capacities. *Id.* at 36a-37a.

The district court also held that the suit could not proceed against the individual defendants in their personal capacities because "Stoner offers no evidence that the employee defendants were acting outside their official capacities during the incidents in question." Pet. App. 37a. Although Stoner had alleged that the defendants, in knowingly submitting false claims, had "abused their authorities," the court held without further explanation that "such allegations do not suffice." *Ibid.*

Finally, the district court held that the entire action was subject to dismissal in any event because a *qui tam* False Claims Act suit cannot be prosecuted *pro se*. Pet. App. 28a-30a.

3. Stoner appealed, and the United States appeared as *amicus curiae* in support of Stoner's argument that government employees sued in their personal capacities are subject to suit under the False Claims Act.

The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-22a. The court affirmed the dismissal of Santa Clara County and the

East Side District on the ground that the County and District are arms of the State protected by Eleventh Amendment immunity. *Id.* at 6a-12a. The court of appeals further noted that Stoner did not contest the dismissal of the individual defendants in their official capacities and, accordingly, "express[ed] *no opinion* on the merits of the district court's conclusion" on that question. *Id.* at 12a.

Relying on the "plain language" of the False Claims Act, the court of appeals reversed the district court's holding that the individual defendants could not be sued in their individual capacities in the absence of a showing that their actions exceeded the scope of their official responsibilities. Pet. App. 12a; see *id.* at 12a-16a. The court explained that "person" in the False Claims Act "includes 'natural persons.'" *Ibid.* (citing *Chandler*, 538 U.S. at 125). The court accordingly held that Stoner's allegations that the individual employees "knowingly presented or caused to be presented false or fraudulent statements to the United States * * * to obtain federal funds" were "sufficient to state a claim for personal liability under 31 U.S.C. § 3729(a)(1)." Pet. App. at 13a.

Finally, the court of appeals affirmed the district court's holding that Stoner could not prosecute the *qui tam* lawsuit *pro se*, Pet. App. 16a-22a, and held that the district court "should dismiss this action, without prejudice to the government," unless Stoner either obtained counsel or permission to appear *pro hac vice* within a "reasonable time." *Id.* at 21a-22a.

ARGUMENT

The court of appeals' interlocutory ruling is correct and does not conflict with the decision of any other circuit. Accordingly, this Court's review is not warranted.[2]

1. Petitioners argue (Pet. 16-22) that this Court's review is warranted at this interlocutory juncture because there is a division in the decisions of lower courts on the question of whether state officials may be sued in their personal capacity under the False Claims Act. There is, however, no conflict in the circuits on the questions presented – as petitioners admit (Pet. 17 n.7, 32) – and the handful of differing decisions in district courts that petitioners identify can be resolved by the circuit courts of appeals. There thus is no reason for this Court's intervention at this premature juncture.

Petitioners contend (Pet. 16-17) that the decision of the Ninth Circuit here is in tension with the Eighth Circuit's ruling in *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (2001), cert. denied, 536 U.S. 925 (2002). But there is neither tension nor conflict between those rulings.

In *Gaudineer*, the plaintiff originally sued the defendants only in their official capacities for their compliance with a policy for admission to the

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[2] Although the defendants are cross-petitioners for certiorari, because Stoner's own petition for certiorari has already been denied, *Stoner v. Santa Clara County Office of Educ.*, 128 S. Ct. 1728 (2008) (No. 07-1093), we refer to the cross-petitioners as "petitioners" for ease of reference.

Medicaid program for mentally retarded individuals. 269 F.3d at 934. Following this Court's decision in *Stevens*, Gaudineer sought to amend the complaint to restate the identical claim as a personal-capacity claim against the sole individual defendant in the case.

The Eighth Circuit upheld the district court's denial of the motion for leave to amend the complaint, noting that substantial proceedings and discovery had already been undertaken in the case. 269 F.3d at 935. In so holding, the court of appeals agreed with the district court's conclusion that amendment would be futile because Gaudineer alleged only that the individual official "had been implementing a state policy on behalf of [the Department of Human Services] and had performed no acts in his individual capacity." *Id.* at 935-936. The Eighth Circuit explained that the amended complaint, although nominally targeted at the individual in his personal capacity, challenged a formal agency policy and, as a result, "would require Iowa to alter its waiver program." *Id.* at 937. The allegations of the amended complaint, moreover, challenged the formal promulgation of official "standards that conflicted with state laws." *Ibid.* Because the amended complaint focused on official conduct and would affect a formal state "waiver program," the court held that, "[u]nder these circumstances," the district court did not err in denying the motion for leave to amend to add a new claim against the official in his individual capacity. *Ibid.*

Importantly, the Eighth Circuit stressed that it was *not* "consider[ing] whether a state official sued in

his individual capacity is a person under the [False Claims Act] or whether the claims against [the official] are barred by the Eleventh Amendment." 269 F.3d at 937 n.3. Those questions – the very questions presented here (Pet. i) – thus remain open within the Eighth Circuit.[3]

Moreover, the Eighth Circuit's denial of leave to amend the complaint has little relevance here, where (i) the original complaint sued the defendants in their individual capacities, Pet. App. 11a; C.A.E.R. Tab 30, pp. 13-14; (ii) no motion to amend late in the proceedings is at issue, (iii) the nature of the allegations – that the defendants deliberately falsified reports of compliance with federal disabilities laws – does *not* implicate any formal state governmental programs or policies, and (iv) the relief requested would not require the alteration of any state program. Instead, the claims recite the very type of individual misfeasance that state law does not countenance, see Calif. Educ. Code §§ 41344, 56845, and thus present traditional allegations of individual-capacity action by governmental officials.

Petitioners also identify (Pet. 17-22) some conflicting district court decisions. What petitioners overlook is that the Ninth Circuit's decision here eliminates any tension in the law within that Circuit.

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[3] The brief in opposition to certiorari filed by the State of Iowa in the *Gaudineer* case underscored that the Eighth Circuit's decision was narrow and case-specific, and did not decide the broad question of state officials' amenability to suit in their personal capacity. See Br. in Opp. at *3, *7-*8, *United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, No. 01-1645, 2002 WL 32134714 (May 17, 2002).

See Pet. 19-20 (seeking review based on contrary district court rulings within the Ninth Circuit). Furthermore, the questions presented have not yet been considered by other courts of appeals, which remain fully capable of harmonizing the remaining district court rulings that petitioners cite. There thus is not, and may never be, any conflict in the circuits for this Court to resolve.[4]

2. This Court's review would be particularly premature not only because there is no conflict in the circuits, but also because this case is in an interlocutory posture. The court of appeals held only that the district court erred in dismissing the complaint for failure to state a claim and remanded for further proceedings. Pet. App. 22a. In addition, the court of appeals separately ordered the case dismissed *in its entirety* unless, on remand, Stoner obtains permission to appear *pro hac vice* or obtains trial counsel. *Id.* at 21a-22a. Stoner has not yet been admitted *pro hac vice*, and it is unclear whether the local rules would permit such admission because he is a California resident. See 2008 California Rules of Court, Rule 9.40(a)(1) (stating that "[n]o person is eligible to appear as counsel *pro hac vice* under this rule if the person is * * * [a] resident of the State of California").[5]

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[4] The question of whether state officials are amenable to personal-capacity suits under the False Claims Act is currently pending in the Tenth Circuit. See *United States ex rel. Burlbaw v Orenduff*, No. 06-2006 (10th Cir. argued Mar. 5, 2007).

[5] In addition, Stoner's efforts to obtain trial counsel have not yet been finalized.

The case thus is in a profoundly preliminary posture. If the case proceeds at all in district court, there will be ample opportunity for this Court's review of the merits and viability of Stoner's claims, should it be warranted, after a final judgment is rendered. There is no need to disrupt the litigation at this early juncture before questions of immunity, liability, and appropriate relief have even been considered by the district court. See Pet. App. 15a n.3.

Indeed, "the general rule" is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). For that reason, this Court routinely denies review of cases in such an interlocutory posture. See, *e.g.*, *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., on denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (citing additional authorities). Further proceedings in district court could result in a judgment favorable to the petitioners, thereby obviating any need for this Court's review. In any event, there is no reason to depart in this case from the "general rule" against piecemeal appellate review, with all of its attendant resource costs (for both parties and the courts) and disruption of the district court's efficient management of the case.

Beyond that, Congress is currently considering bipartisan legislation that would amend the False Claims Act. See S. 2041, 110th Cong., 1st Sess.

(Sept. 12, 2007); H.R. 4854, 110th Cong., 1st Sess. (Dec. 19, 2007). The pending bills were designed in part to respond to "recent court decisions." Statement of Patrick Leahy, *Hearing of the Sen. Comm. On the Judiciary: The False Claims Correction Action (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud For The 21st Century*, 110th Cong., 2d Sess. 2008 WLNR 4359143 (Feb. 27, 2008). The pendency of such legislation makes interlocutory review at this early juncture especially inappropriate.

3. Notwithstanding the absence of an inter-circuit conflict and the case's interlocutory posture, petitioners contend (Pet. 32-34) that review is warranted because of the burden the court of appeals' decision allegedly would impose on state treasuries. But this case is a particularly inapt vehicle for consideration of that issue because it concerns the liability of *district* and *county* education officials. In most States, district and county education officials are already subject to suit under the False Claims Act. That is because, in most jurisdictions, education officials and agencies are not arms of the state and thus are fully amenable to a False Claims Act suit under this Court's decision in *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003).[6]

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[6] Other courts of appeals, as well as the Ninth Circuit with respect to States other than California, have frequently declined to hold that local school districts and boards are arms of the state. See, *e.g.*, *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1181-1189 (9th Cir. 2003) (Alaska); *Savage v. Glendale Union High School Dist.*, 343 F.3d 1036, 1041-1051 (9th Cir. 2003) (Arizona), cert. denied, 541 U.S. 1009 (2004);

Thus, for the vast majority of petitioners' counterparts across the country, both Congress and this Court have already rejected the very policy arguments advanced by petitioners here. See *Chandler*, 538 U.S. at 129-134 (rejecting arguments against coverage of local government officials based on treble damages provision, need to protect taxpayers, and government's extensive participation in federal funding programs). This case accordingly provides a poor vehicle for considering whether the practical and federalism implications of extending False Claims Act liability to state officials in their personal capacity would be distinct from the already accepted extension of similar liability to tens of thousands of local governmental defendants under *Chandler*.

Eason v. Clark County Sch. Dist., 303 F.3d 1137, 1142-1144 (9th Cir 2002) (Nevada), cert. denied, 537 U.S. 1190 (2003); *Narin v. Lower Merion Sch. Dist.*, 206 F.3d 323, 331 n.6 (3d Cir. 2000); *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 981-982 (10th Cir. 1997); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 997 (10th Cir. 1993); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1511 (11th Cir. 1990); *Rosa R. v. Connelly*, 889 F.2d 435, 438 (2d Cir. 1989), cert. denied, 496 U.S. 941 (1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 27-28 (2d Cir. 1986); *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986); *Minton v. St. Bernard Parish Sch. Bd.*, 803 F.2d 129, 131-132 (5th Cir. 1986); *Stoddard v. School Dist. No. 1*, 590 F.2d 829, 835 (10th Cir. 1979); *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1123 (10th Cir. 1978); *Campbell v. Gadsden County Dist. Sch. Bd.*, 534 F.2d 650, 655-656 (5th Cir. 1976); *Adams v. Rankin County Bd. of Educ.*, 524 F.2d 928, 929 (5th Cir. 1975), cert. denied, 438 U.S. 904 (1978).

4. The decision of the court of appeals is correct for three reasons. First, the plain language of the False Claims Act states without qualification that "any person" who knowingly submits or causes the submission of false claims to the United States is subject to liability, and the ordinary and established meaning of that term includes natural persons like petitioners. See 1 U.S.C. 1; *Hafer v. Melo*, 502 U.S. 21, 27 (1991) ("A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person.'"). Nothing in the statute creates an exception for government officials in their personal capacities, and certainly not for officials whose status as local or state officials varies significantly from State to State. Quite the opposite, the False Claims Act expressly denominates which natural persons are excluded from its coverage. See 31 U.S.C. 3730(e)(1) & (2) (excepting members of the armed forces, members of Congress, members of the Judiciary and certain listed senior executive branch officials). Congress did not include personal capacity suits against state officials on that list, and that textual omission must be given effect. *Bank of State of Alabama v. Dalton*, 50 U.S. 522, 529 (1850) ("Wherever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception, and it would be going far for this court to add to those exceptions. The rule is established beyond controversy.").

Second, nothing in the text, history, or purposes of the False Claims Act calls for the exclusion of petitioners from the class of persons covered by the Act in 1863, when the statute was originally enacted. To the contrary, *Chandler* establishes that "person"

encompassed governmental officials in 1863, and that understanding is confirmed by the widespread inclusion of state officials in their personal capacity under 42 U.S.C. 1983, which was enacted by the 1871 Congress – within eight years of the False Claims Act's passage. While petitioners contend that the political relationship of the States to the federal government changed during that time period, they offer no evidence at all that either the ordinary meaning of the word "person" changed, or that *Congress's* view of the relationship between the States and the federal government with respect to false claims changed in the short interval between the two statutes.

In fact, the Congress that enacted the False Claims Act was specifically concerned with incidences of fraud committed by state officials in the procurement of military supplies for state troops. *See* Government Contracts, H.R.Rep. No. 37-2, pt. ii-a (1862). This 1862 Report noted that hearings had revealed an "unpardonable eagerness" on the part of state officials to engage in "fraud and speculation" in connection with "large and lucrative government contracts." *Id.* at XXXVIII, XXXIX. The Congress that enacted the False Claims Act just one year after the issuance of that Report thus was particularly unlikely to have carved out individual state officials from the Act's compass. Rather, debates at the time suggest that the Act was intended "to reach all types of fraud, *without qualification*, that might result in financial loss to the Government." *Chandler*, 538 U.S. at 129 (quoting *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968)) (emphasis added).

Third, petitioners' narrow construction of the statute is inconsistent with the broad purpose of the False Claims Act, which has consistently been construed expansively to cover all frauds upon the United States, including frauds perpetrated by government officials. *See Chandler, supra; Rainwater v. United States*, 356 U.S. 590, 592 (1958). Reading artificial limitations into the ordinary sweep of the term "person" would immunize an entire class of individuals from False Claims Act liability – individuals who "are commonly at the receiving end of all sorts of federal funding schemes and thus no less able than individuals or private corporations to impose on the federal fisc and exploit the exercise of the federal spending power." *Chandler*, 538 U.S at 129. The definition that petitioners proffer, moreover, would preclude suit not only by *qui tam* relators, but also by the United States itself, because the single term "person" applies equally regardless of who pursues the False Claims Act suit to conclusion. Cf. *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

5. With respect to the second question presented, petitioners offer no distinct argument in support of certiorari. Respondent Stoner is aware of no conflict in the circuits on the question, or any authority at all that would support the notion that the Eleventh Amendment applies to personal capacity suits. Indeed, the settled law is that the Eleventh Amendment has no application in that context. See, *e.g.*, *Hafer*, 502 U.S. at 30-31.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

No. 07-1336

COLLEEN B. WILCOX, ET AL., CROSS-PETITIONERS

v.

UNITED STATES EX REL. JOHN DAVID STONER

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR CROSS-PETITIONERS

The Ninth Circuit's holding exposes tens of thousands of state officials to *qui tam* actions for mandatory treble damages and per claim penalties under the False Claims Act (FCA) for actions taken within the scope of the defendants' official duties even if those actions did not result in private, pecuniary gain. That ruling conflicts with the law of the Eighth Circuit and multiple district-court rulings from other circuits, conflicts with the logic of two of this Court's recent FCA decisions, and presents pure questions of federal law that are of significant, national importance.

At the Court's request, cross-respondent John David Stoner has filed a response to the cross-

petition for a writ of certiorari. Mr. Stoner has provided no persuasive reason for this Court to leave the Ninth Circuit's far-reaching ruling undisturbed. Accordingly, the cross-petition should be granted.

A. The Ninth Circuit's Decision Created an Acknowledged Circuit Split

The Ninth Circuit's decision, which authorizes *qui tam* suits against state officials related to conduct within the scope of the defendants' official duties, is in direct conflict with the Eighth Circuit's decision in *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001). In *Gaudineer*, the Eighth Circuit held that in order for a *qui tam* relator to assert an FCA cause of action against a state official in his individual capacity, the relator must allege that the official acted outside the scope of his official duties. *Id.* at 937.

In ruling that *qui tam* relators can sue state officials for conduct *within* the scope of their official duties, the Ninth Circuit below expressly recognized that its ruling conflicted with *Gaudineer* and concluded that the contrary reasoning of *Gaudineer* could not be "reconciled with the plain language of the [FCA]." Cross-Pet. App. 13a; *see also United States ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp. 2d 1209, 1215 (D.N.M. 2004) (recognizing legal conclusion reached by the Ninth Circuit below would conflict with *Gaudineer*), *appeal pending sub nom. United States ex rel. Burlbaw v. Orenduff*, No. 06-2006 (10th Cir.). Moreover, as recognized by the *amicus* brief filed by twenty-four States in support of the cross-petition, the circuit split created by the Ninth Circuit's ruling is real and "creates substantial uncertainty for states and state officials

that are considering whether and how to participate in state-federal cooperative programs." *Amici* States Br. 6.

Mr. Stoner's assertion (Br. in Opp. 5-7) that the Ninth Circuit's decision does not conflict with *Gaudineer* places undue reliance on a single footnote in *Gaudineer*. As the cross-petition explained (Cross-Pet. 17 n.7), the *Gaudineer* majority stated that it did not need to decide whether the state-official-defendant was a "person" within the meaning of the FCA's liability provision or whether the Eleventh Amendment barred the relator's suit. *See* 269 F.3d at 937 n.3.

In concluding based on that single footnote that the law of the Eighth Circuit does not conflict with the law of the Ninth Circuit, Mr. Stoner fails to appreciate the broader issue presented by the cross-petition: namely, whether private bounty hunters can prosecute *qui tam* suits under the FCA for mandatory treble damages and per claim penalties against state officials for conduct *within* the scope of the defendants' official duties. That broad issue encompasses two subsidiary legal questions. The first is whether, as a matter of statutory interpretation, a state official is a "person" subject to *qui tam* suits under the FCA for conduct within the scope of their official duties. If so, the second question is whether the Eleventh Amendment nonetheless bars the particular remedy of a private relator's *qui tam* action.

Simply because the Eighth Circuit stated it did not need to reach the subsidiary "person" and Eleventh Amendment questions does not change the fact that the Eighth Circuit decided the broader question

in a manner that conflicts directly with the Ninth Circuit's decision below. *See Gaudineer*, 269 F.3d at 940 (Gibson, J., dissenting) (rejecting majority's scope-of-duty analysis and reaching identical conclusion of Ninth Circuit below).

Mr. Stoner concedes that the Ninth Circuit's ruling conflicts with the multiple district court decisions identified in the cross-petition. He nonetheless argues that those decisions "can be resolved by the circuit courts of appeals." Br. in Opp. 5. Additional percolation in the lower courts is unnecessary, however, and will produce an undue burden on States, state agencies and state officials. As the Department of Justice recently admitted in congressional testimony, the Department does not perform a gatekeeping function to weed-out unmeritorious *qui tam* suits, and, as a result, these suits will continue to be prosecuted against state officials. *See The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 56 (2008).

Now is the time for this Court to decide the threshold question of whether those suits are permissible. *Cf. Wilkie v. Robbins*, 127 S. Ct. 2588, 2605-08 (2007) (holding federal officials are not subject to private RICO actions for treble damages related to conduct within the scope of the defendants' official duties not resulting in private gain).

B. The Questions Presented Are of Significant, National Importance

The importance of the questions presented would independently warrant this Court's review even in

the absence of a circuit split. By his silence, Mr. Stoner concedes that the questions presented by the cross-petition are of national importance. For example, Mr. Stoner makes no attempt whatsoever to respond to the four *amicus* briefs filed in support of the cross-petition.

These *amicus* submissions demonstrate that cross-petitioners' assertion (Cross-Pet. 15, 32-33) that the ruling below will have devastating consequences for state officials and state programs of all types is more than just hollow, the-sky-is-falling rhetoric of an interested party. *See, e.g.*, *Amici* States Br. 2 (explaining that allowing *qui tam* suits against state officials "will create serious practical problems for the day-to-day operation of state programs because they will expose individual state officers and employees to costly and protracted litigation carrying the threat of substantial personal liability and because they will permit any person to bring a back-door challenge to the operation of any state program that receives federal funding"); *Amici* State Agencies Br. 6 (explaining that allowing *qui tam* suits against state officials "will impair the administration of federal-state programs that provide necessary services to citizens and will cause serious administrative problems for state agencies"); Br. *Amici* of Statewide Ass'n of Cmty. Colleges 16 (explaining that allowing *qui tam* suits against state officials "presents a very serious danger to the States," many of which are facing severe budget shortfalls).

The question of whether private bounty hunters can haul state officials into federal court on behalf of the Federal Government raises issues that go to the

very core of our federalist system of government. Now is the time for this Court to decide the threshold question of whether those suits are permissible.

C. This Case Is Ripe for Review and Provides an Excellent Vehicle

1.a. Although Mr. Stoner argues (Br. in Opp. 8) that review in this case would be "premature" due to its interlocutory posture, he does not suggest that anything more need be done for this Court to decide the pure questions of federal law raised by the cross-petition. *See, e.g.*, *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 124 (2003) (deciding whether municipal corporations are "person[s]" subject to *qui tam* suits after court of appeals reinstated suit following dismissal by district court); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 770 (2000) (deciding whether States and state agencies are "person[s]" subject to *qui tam* suits after court of appeals affirmed district court's denial of motion to dismiss). Furthermore, if this Court were to decide the questions presented in favor of cross-petitioners, such a ruling would dispose of this case in its entirety.

b. Mr. Stoner also suggests (Br. in Opp. 8) that the petition should be denied because the Ninth Circuit ordered the case dismissed on remand if Mr. Stoner fails to obtain *pro hac vice* admission or to retain counsel. According to Mr. Stoner, "it is unclear whether the local rules would permit such admission because he is a California resident" (*id.*) and Mr. Stoner's "efforts to obtain trial counsel have not yet been *finalized*" (*id.* at 8 n.5) (emphasis added). Mr. Stoner is a well-educated lawyer who has retained counsel to prosecute his parallel state suit,

the dismissal of which was recently affirmed on appeal. *See California ex rel. Stoner v. Santa Clara County Office of Educ.*, No. H031576, 2008 WL 2310357 (Cal. Ct. App. 6th Dist. June 5, 2008). Given the tenacity with which he has prosecuted this suit over the past five years, cross-petitioners have no doubt, and neither should this Court, that Mr. Stoner would obtain *pro hac vice* admission or retain counsel were this case remanded to the district court.

c. The pendency of false claims legislation in Congress, Mr. Stoner contends, "makes interlocutory review at this early juncture especially inappropriate." Br. in Opp. 10. Neither of the pending bills he cites addresses the question of whether state officials are proper *qui tam* defendants. *See* S. 2041, 110th Cong. (2007); H.R. 4854, 110th Cong. (2007). Even if they did, neither bill has reached the floor of its respective House of Congress, and with what little time remains before adjournment of the 110th Congress, it remains extremely unlikely that any such legislation will be enacted.

2.a. Mr. Stoner's strained effort to narrow the scope of the Ninth Circuit's sweeping ruling also lacks merit. According to Mr. Stoner, this case "is a particularly inapt vehicle for consideration of [the questions presented] because it concerns the liability of *district* and *county* education officials." Br. in Opp. 10 (emphasis in original). However, by its express terms, the Ninth Circuit's holding applies to *state* officials of all types, a fact evidenced by the wide variety of state interests represented in the several *amicus* submissions filed in support of the cross-petition. Moreover, this Court has already denied Mr. Stoner's petition for a writ of certiorari

challenging the Ninth Circuit's ruling that cross-petitioners are properly classified as state officials, 128 S. Ct. 1728 (2008), and thus that issue is no longer subject to dispute.[1]

b. The only vehicle problem that may have militated against issuance of the writ—Mr. Stoner's *pro se* status—is no longer present. Mr. Stoner acted *pro se* in the district court and before the court of appeals. To the extent that Mr. Stoner's *pro se* status may have counseled against granting the cross-petition when it was first filed, that consideration no longer exists. Mr. Stoner has retained counsel with extensive experience litigating matters before this Court. As a result, the Court can issue the writ "satisfied that the relevant issues [will be] fully aired." *Clay v. United States*, 537 U.S. 522, 526 n.2 (2003).

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[1] To the extent that Mr. Stoner's citation (Br. in Opp. 8 n.4) of the pending *Burlbaw* appeal is meant to suggest that *Burlbaw* will provide a better vehicle to decide the questions presented by the cross-petition, he is mistaken. There is a substantial possibility that the Tenth Circuit will not reach the questions presented by the cross-petition, but instead will assume their answers in addressing the less difficult question of whether the district court correctly dismissed the suit on qualified immunity grounds. *See United States ex rel. Burlbaw v. Orenduff*, 400 F. Supp. 2d 1276 (D.N.M. 2005), *appeal pending*, No. 05-2393 (10th Cir.). The threshold issue of whether state officials are proper *qui tam* defendants is only asserted in *Burlbaw* as a cross-appeal of the district court's 2004 ruling, and as such the threshold issue, which is squarely raised by this case, may never be decided by the Tenth Circuit.

D. Mr. Stoner's Argument on the Merits Fails to Supply the Logic Missing from the Ninth Circuit's Flawed Decision

The Ninth Circuit's ruling is correct, Mr. Stoner contends, because the FCA's text, history and purpose suggest state officials should be subject to *qui tam* suits. He is mistaken. More important for present purposes, however, is the fact that Mr. Stoner does not directly contest cross-petitioners' assertion that the Ninth Circuit's ruling is inconsistent with the logic of *Stevens* and *Chandler*, both of which teach that the intent of the 1863 Congress controls the question of who or what is a "person" amenable to *qui tam* suits under the FCA. Implicitly recognizing that the Ninth Circuit's unquestioned application of *Hafer v. Melo*, 502 U.S. 21 (1991), runs counter to *Stevens* and *Chandler*, Mr. Stoner attempts to supplement the Ninth Circuit's flawed decision by engaging in the type of analysis the court of appeals failed to perform. That effort fails.

In support of his argument that the FCA's use of the word "person" should be read to include state officials acting in their official capacity, Mr. Stoner cites language in the FCA limiting the liability of certain federal officials. Br. in Opp. 12. Mr. Stoner neglects to mention that the language he cites was added to the FCA in 1986. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (codified at 31 U.S.C. § 3730(e)(1), (2)); *see also* 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.03[A] at 4-124.1 (3d ed. Supp. 2008) (explaining legislative language was added out of concerns regarding "politically motivated" *qui tam* suits against federal officials, "although, arguably,

these concerns were addressed by other immunities already extant"). These statutory amendments provide no evidence regarding the intent of the 1863 Congress. *See Stevens*, 529 U.S. at 783 n.12 (rejecting use of 1986 amendments for discerning meaning of 1863 Congress's use of the word "person").

Congress knows how to enact specific statutory language providing for state-official liability when it intends civil statutes of general applicability to be so applied. *See* Cross-Pet. 26 n.9 (listing examples). In arguing that the FCA, which contains no such language, was meant to reach state officials acting in their official capacities, Mr. Stoner relies on the very same "legislative history" this Court rejected in *Stevens*. The 1862 House report Mr. Stoner cites was found to be irrelevant in *Stevens*, not only because it was issued by only one committee of one House of Congress, but because it was not issued in connection with the 1863 Act or any other proposed false claims legislation. *Stevens*, 529 U.S. at 783 n.12. This Court also found that the 1862 report did not describe conduct by state officials directed against the Federal Government, and as such the 1862 report did not suggest that the 1863 Congress intended to regulate the conduct of state actors via the FCA. *Id.*; *see also United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870, 876 (D.C. Cir. 1999) (noting that 1862 report discussed examples of certain state officials who had used war contracts for *personal* profit and examples of fraud were *not* directed against the United States).

Mr. Stoner cites no legislative history directly related to the 1863 Act, let alone anything else suggesting that Congress intended to set loose an army

of bounty hunters on state officials for conduct within the scope of their official duties not resulting in private, pecuniary gain. In Mr. Stoner's view, the FCA is an all-encompassing fraud statute. As this Court's decisions make clear, however, the FCA "was not designed to reach every kind of fraud practiced on the [Federal] Government," *United States v. McNinch*, 356 U.S. 595, 599 (1958), nor was it intended to "cover all types of *fraudsters*," *Stevens*, 529 U.S. at 781 n.10 (emphasis in original); *see also Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2130 (2008) (rejecting interpretation rendering FCA "an all-purpose anti-fraud statute").

The FCA was designed to "ferret[] out and punish[]" frauds upon the Federal Government. Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Wilson); *see also* Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Howard) (describing FCA's *qui tam* provision as a "mode of proceeding to punish persons"). Such a statute is extremely ill-suited for application against state officials related to conduct within the scope of their official duties not resulting in private, pecuniary gain. *Cf. Wilkie*, 127 S. Ct. at 2606-07. This is especially true when the statute's awesome power is wielded by private bounty hunters who are largely unaccountable for their actions.

Lastly, Mr. Stoner's reformulation of the questions presented (Br. in Opp. i) should be rejected because it assumes the answer to one of the core legal questions raised by this dispute: namely, whether the 1863 Congress recognized the distinction between official-capacity and personal-capacity

suits brought by private individuals against state officials for injuries not sustained by the private individuals themselves. *See* N.M. State Univ. *Amicus* Br. 7 (arguing distinction was not recognized at time of FCA's 1863 enactment); Br. *Amici* of Statewide Ass'n of Cmty. Colleges 5 (same). In addition, this case does not ask whether the United States may prosecute FCA suits against state officials; this case asks only whether *qui tam* relators may prosecute such suits. *See Stevens*, 529 U.S. at 789 (Ginsburg, J., concurring) (recognizing importance of distinction).

* * * * *

For the reasons stated above, in the cross-petition and in the four *amicus* briefs filed in support of cross-petitioners, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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UNITED STATES ex rel.
JOHN DAVID STONER,

Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF CALIFORNIA, ALABAMA, ALASKA, HAWAII, IDAHO, IOWA, KANSAS, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF CROSS-PETITIONERS

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QUESTIONS PRESENTED

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes a private individual (the relator) to bring a *qui tam* civil action for treble damages and per claim penalties against "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." First enacted in 1863, the FCA's liability provision does not include a definition of the word "person." In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that States and state agencies are not "person[s]" amenable to *qui tam* suits under the FCA. Although the Court expressed "serious doubt" as to whether such suits would even be permitted under the Eleventh Amendment, it did not decide the issue, nor did it decide whether individual state officials are "person[s]" amenable to *qui tam* suits under the FCA. The questions presented are:

1. Whether the Ninth Circuit erred in holding that state officials are "person[s]" amenable to *qui tam* suits under the FCA for actions taken in their official capacities.

2. Whether the Ninth Circuit erred in holding that the Eleventh Amendment does not bar the continued prosecution of an FCA *qui tam* suit brought against state officials after the United States declines to intervene in that suit.

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INTEREST OF AMICI CURIAE[1]

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that states could not be sued by private relators under the False Claims Act (FCA). This case presents the question of whether private relators may side-step *Stevens* by suing state officials for alleged false claims submitted in the course of their duties and from which they received no personal financial benefit. Such actions would permit relators to harass state officials with costly and protracted litigation, to threaten them with potentially overwhelming personal liability, and to mount back-door challenges to the operation of state programs in federal court. In addition, the circuit split created by *Stoner* causes uncertainty for states and state officials as they consider whether and how to participate in federal programs. The states have a natural interest in the resolution of this question.

ARGUMENT

In *Stevens* this Court protected states from *qui tam* actions by private relators under the FCA. The Ninth Circuit's decision in this case creates a circuit split on the question of whether private relators may side-step *Stevens* by suing state officials for acts performed in the course of their duties and from

[1] Counsel of record received notice of amici's intent to file this brief more than ten days before the due date.

which they received no personal financial benefit. Such suits will create serious practical problems for the day-to-day operation of state programs because they will expose individual state officers and employees to costly and protracted litigation carrying the threat of substantial personal liability and because they will permit any person to bring a back-door challenge to the operation of any state program that receives federal funding. The circuit split created by *Stoner* also creates uncertainty for states and state officials as they consider whether and how to participate in cooperative state-federal programs.

I. THE COURT OF APPEALS' DECISION CREATES A CIRCUIT SPLIT ON THE QUESTION OF WHETHER INDIVIDUAL CAPACITY *QUI TAM* ACTIONS AGAINST STATE OFFICIALS FOR ACTIONS TAKEN IN THE COURSE OF THEIR DUTIES STATE A CLAIM.

The Ninth Circuit's decision in this case conflicts with *Gaudineer v. Iowa*, 269 F.3d 932 (8th Cir. 2001), on the question of whether individual capacity *qui tam* actions against state officials for actions taken in the course of their duties, and from which they received no personal financial benefit, state a claim upon which relief may be granted. The Ninth Circuit acknowledged this conflict when it disagreed with *Gaudineer* to the extent that its reasoning "cannot be reconciled with the plain language of the [FCA]." *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1124 (9th Cir. 2007).

In *Stoner* the relator alleged that two California school districts[2] and three district employees were violating the FCA by accepting federal funding while failing to comply with requirements for special education programs. The district court dismissed the action for failure to state a claim. (App. to Cross-Pet. 37a.) The court relied upon *Stevens*, which held that relators could not sue states under the FCA because "various features of the FCA, both as originally enacted and as amended, far from providing the requisite affirmative indications that the term 'person' included States for purposes of *qui tam* liability, indicate quite the contrary." 529 U.S. at 787.[3] The district court held that the relator's complaint failed to state a claim against the individual defendants because the relator had "offer[ed] no evidence that the employee defendants were acting outside their official capacities during the incidents in question." (App. 37a.)

The Ninth Circuit affirmed the dismissal as to the districts but reversed as to the individual defendants. It held that "state employees may be sued in

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[2] California school districts are arms of the state for purposes of Eleventh Amendment sovereign immunity. *See Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995).

[3] *Stevens* did not reach the question of whether such an action would also run afoul of the Eleventh Amendment, but it noted "that there is 'a serious doubt' on that score." *Stevens*, 529 U.S. at 787, *quoting Ashwander v. TVA*, 297 U.S. 288, 348 (1936).

their individual capacities under the FCA for actions taken in the course of their official duties" and that the district court had therefore "erred in holding that Stoner had failed to state a claim under § 3729 against [the individual defendants] in their personal capacity." 502 F.3d at 1125.

This holding is in direct conflict with *Gaudineer*. There, the relator alleged that the State of Iowa, a state agency, and a state official were violating the FCA by using Medicaid funds to provide home and community-based services to certain categories of developmentally disabled persons. *Gaudineer*, 269 F.3d at 934-35. After *Stevens* was decided the relator dismissed its action as to the state and the agency and it sought leave to amend to name the official in his individual capacity. The district court denied leave to amend because the amendment would have been futile. *Id.* at 935-36. The amended complaint failed to state a claim because the official "had been implementing a state policy . . . and had performed no acts in his individual capacity." *Id.*

The Eighth Circuit affirmed the denial of leave to amend. *Id.* at 938. It held that "[i]n determining whether a state official may be liable for money damages in his individual capacity courts should not rely wholly on 'the elementary mechanics of captions and pleading'. . . . [they] should look at whether the alleged conduct of the defendant was 'outside of [his] official duties.'" *Id.* at 936, *quoting Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) and *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir.

2001). The proposed amendment did not allege "what [the employee's] specific duties or powers were . . . or how he acted outside those duties. . . ." and the district court therefore "did not err in denying the motion for leave to amend to add a new claim against [the official] in his individual capacity." *Id.*[4]

Thus, *Stoner* and *Gaudineer* are in direct conflict on the question of whether individual capacity *qui tam* actions against state officials for acts performed in the course of the official's duties state a claim upon which relief may be granted. *Compare Stoner* 502 F.3d at 1125 *with Gaudineer*, 269 F.3d at 936. This conflict is reflected in the divergent approaches taken by other courts that have addressed this issue. *See, e.g., Alexander v. Gilmore*, 202 F. Supp. 2d 478, 480 (E.D. Va. 2002) (relator may not sue state officials); *United States ex rel. McVey v. Bd. of Regents*, 165 F. Supp. 2d 1052, 1059 (N.D. Cal. 2001) (same); *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir. 2001) (same); *United States ex rel. Burlbaw v. Regents*, 234 F. Supp. 2d 1209, 1218 (D.N.M. 2004) (relators may sue state officials); *United States ex rel. Battle v. Board of Regents of Georgia*, No. 1:00-CV-1637, 2002 WL 34386372 (N.D. Ga. 2002) (same); *also State ex rel. Dockstader v. Hamby*, 162 Cal. App. 4th 480, 484 (2008) ("employees of a public agency, acting

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[4] *Gaudineer* did not reach the questions of whether a state official is a "person" for purposes of the FCA or whether *qui tam* actions against state officials would be barred by the Eleventh Amendment. 269 F.3d at 938, n. 3.

in the course and scope of their employment, and solely on the agency's behalf, are not proper defendants under" the California False Claims Act).

II. THE DISRUPTION AND UNCERTAINTY CREATED BY *STONER* IS OF SUBSTANTIAL AND IMMEDIATE CONCERN TO THE STATES.

The questions posed by this case are of substantial and immediate concern to the states. The individual capacity *qui tam* actions permitted by *Stoner* will interfere with state programs by permitting private relators to threaten state officials with costly and protracted litigation carrying the threat of substantial personal liability. These actions will also permit relators to mount back-door challenges to the operation of any state program or agency that accepts federal funding. As a result, these actions are, from the states' perspective, no different from the direct actions barred by *Stevens*. The circuit split created by *Stoner* also creates substantial uncertainty for states and state officials that are considering whether and how to participate in state-federal cooperative programs.

A. The actions permitted by *Stoner* will create serious practical problems for the administration of state programs.

Stoner will create serious practical problems for the day-to-day operation of every state agency and

program throughout the country that receives federal funding. *Stoner* will permit any person to challenge a state's technical non-compliance with federal eligibility requirements by bringing a *qui tam* action that will be costly to defend and which will threaten state officers or employees with potentially overwhelming personal liability.

It will not be difficult for private persons to bring *qui tam* actions that, even if ultimately meritless, will subject the states and their individual employees to protracted litigation that will be costly to defend in terms of staff time, agency resources, and legal fees. *See* David T. Bradford, *Qui Tam Litigation: an In-house Perspective*, N97WCCB ABA Legal Ed. I-19 (1997); *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century:* Hearing on S. 2041 Before the S. Comm. on the Judiciary, 110th Cong. (2008) (statement of John T. Boese) (discussing the costs of defending a *qui tam* action); William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 225 (1998). The FCA imposes liability on any person who knowingly presents a false or fraudulent claim for payment to the federal government. 31 U.S.C. § 3729(a)(1). The relator is not required to prove that the defendant had an intent to defraud the government. He or she need only show that the defendant acted with deliberate ignorance or reckless disregard of the truth or falsity of the claim. 31 U.S.C. § 3729(b). It is therefore difficult to defend

a *qui tam* action based upon the defendant's mental state. *See* John Munich and Elizabeth Lane, *Symposium: When Neglect Becomes Fraud: Quality of Care and False Claims*, 43 St. Louis L.J. 27, 36 (1999).

In addition, a claim does not need to be fraudulent to be actionable under the FCA – it need only be false. 31 U.S.C. § 3729(a). A claim may be false if it is based upon a reasonable but ultimately incorrect interpretation of a federal regulation. *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999). A claim that is true on its face may still be false for purposes of the FCA if it constitutes an implied false certification of compliance with a federal program requirement. *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001). Thus, it will not be difficult for relators to harass public officials with *qui tam* actions that, even if ultimately meritless, will burden the defendants with costly and protracted litigation.

These *qui tam* actions will not be restrained by considerations of fairness or sound public policy or by traditional concepts of standing. Relators are not public prosecutors. The *qui tam* provisions of the act enable lawsuits motivated by the "'strong stimulus of personal ill will'" or the "prospect[] of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997), *quoting United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541, n. 5 (1943) and *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885). Moreover, there is no requirement that a person demonstrate

individualized standing in order to pursue a *qui tam* action. *See Stevens*, 529 U.S. at 774.[5]

These actions will interfere with the administration of state programs. First, they will threaten state officers and employees with costly and protracted litigation carrying the potential of overwhelming personal liability. The treble damages, civil penalties, costs, and attorneys fees available to relators under the FCA, combined with the size of most federal

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[5] *Qui tam* actions, which "hold[ ] out a temptation, and 'set[ ] a rogue to catch a rogue,'" are critical to identifying and prosecuting frauds perpetrated by private contractors against the government. *See United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 293 (5th Cir. 1999), *quoting* Cong. Globe, 37th Cong., 3d Sess. 955-956 (1863). Indeed, this was their purpose. *Stevens*, 529 U.S. at 782. Yet they are ill suited to the states or to state officials. The states are not profit-driven private corporations. They are sovereign states, accountable to the electorate, whose acts and programs are subject to public scrutiny and review. *See* Cal. Gov't Code §§ 11120-11132 (requiring public meetings); CAL. CONST. art. I, § 3 (guaranteeing access to public records); Cal. Gov't Code §§ 6250-6270 (same). State officials are, by and large, dedicated public servants and they have no personal financial incentive to submit false claims on behalf of the states. The states work closely with their federal partners to implement joint programs that involve detailed reporting, audit and information exchange requirements. *See, e.g.*, 29 U.S.C. § 667(c)(8); 29 C.F.R. §§ 1954.1-1954.22 (state OSHA programs). Moreover, the states and the federal government share an enduring relationship that will last as long as the Union stands. The federal government can easily review a state's use of federal funds, and it will always be able to recover any over-payment by reducing the amount of future payments to the state. *See, e.g.*, 32 U.S.C. § 710 (recovery of funds provided for the National Guard).

grants to the states, mean that the damages in such a case would quickly exceed the personal assets of most civil servants. *See* 31 U.S.C. §§ 3729(a), 3730(d). Indeed, the potential treble damages in a *qui tam* action challenging California's eligibility for the $23,000,000,000 in federal health care funds administered by the state's Department of Health Care Services, would equal a staggering 70% of the state's general fund budget. *See* State of California, *Governor's Proposed Budget for Fiscal Year 2008-2009,* sched. 9. Even in this case, which involves federal aid for the operation of a small alternative school, the FCA treble damages alone sought from the three individual defendants exceed $2,500,000. (App to Cross-Pet. 95a, 97a, 99a.)

The states will have no choice but to defend these actions and indemnify their employees. The states, like the federal government, regularly defend and indemnify their officers and employees from claims arising from actions taken in the course of their official duties. *See, e.g.,* Cal. Gov't Code § 825; N.Y. Pub. Off. Law § 17; 28 C.F.R. § 50.15. This protection is vital to the states' ability to attract and retain qualified public servants. It also provides state officials with the ability to do their jobs without being paralyzed by the fear that any misstep could impose substantial personal liability on themselves and their families.[6] It gives them room to take initiative and to

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[6] Private sector employees are not forced to stand alone in the face of a *qui tam* action because their employers may also be sued. State employees do not enjoy this same protection because

(Continued on following page)

be innovative in designing and implementing public programs. Given this reality of indemnification, the effect of individual capacity actions will be "identical to a suit against the state. The money will flow from the state treasury to the plaintiffs. This is not hypothetical, but inescapable . . . " *Luder v. Endicott*, 253 F.3d 1020, 1024 (7th Cir. 2001); *see also* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* 221, n. 19 (2004) (encouraging relators to confirm that a public employee defendant will be indemnified before bringing suit).

These actions will also interfere with the administration of state government because they are in substance challenges to the state's compliance with federal program requirements. A judgment for the relator would force the state to stop accepting the federal funding at issue or to change the challenged program, regulation or statute to comply with the relator's demands. If not, state officials would continue to face mounting treble damages and civil penalties for an ongoing violation of the FCA. The states will have no choice but to defend these actions.

These suits will provide a back-door for private relators to challenge the compliance of state programs, regulations, and statutes with federal program requirements in federal court. For example, every cabinet-level agency of the State of California

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states may not be sued by relators under the FCA. *See Stevens*, 529 U.S. at 787.

receives and administers federal funds. In total, 65 different California state agencies receive more than $70 billion in federal funds and property annually in more than 350 different program areas. *See* State of California, *Governor's Proposed Budget for Fiscal Year 2008-2009*, sched. 9; California Department of Finance, *Single Audit Report 2005-2006* 175-191. These federal funds and property flow to agencies as diverse as California's Office of Emergency Services ($1,013,606,000); Arts Council ($1,086,000); Departments of Toxic Substances Control ($27,391,000), Forestry and Fire Protection ($22,577,000) and California Highway Patrol ($17,546,000); National Guard ($882,661,000); State Library ($19,633,000); and the California Judiciary ($8,239,000). *Id.* Every one of these departments will become a potential target for *qui tam* actions motivated by personal animus, political disagreement, or the prospect of monetary gain. Cooperative state-federal programs such as Medicaid will be most vulnerable to these attacks because they combine large amounts of federal funding, complex systems for the delivery of public services, and detailed and voluminous federal program requirements. *See, e.g.*, 42 U.S.C. §§ 1396-1396v (state Medicaid programs); 42 C.F.R. §§ 430.0-476.104 (same); Ctrs. for Medicare & Medicaid Servs., Pub. No. 45, *The State Medicaid Manual*. California's Department of Health Care Services alone administers more than $23,000,000,000 in federal health care funding annually. *See* State of California, *Governor's Proposed Budget for Fiscal Year 2008-2009*, sched. 9.

The states' fear that individual capacity *qui tam* suits will invite back-door challenges to state programs is rooted in experience. In *Stoner* the relator used a *qui tam* action to mount a detailed challenge to the manner in which special education services are provided to high school students. *See Stoner*, 502 F.3d at 1120-21. He challenges the districts' practices for academic testing, provision of textbooks and classroom access to the Internet, access to social, recreational and extracurricular activities, and the operation of the districts' intern teacher program. (App. to Cross-Pet. 74a-87a.) *Gaudineer* was no different. There, the relator attempted to use a *qui tam* action to challenge the State of Iowa's decision to expand eligibility for home and community based care services for persons with developmental disabilities. *Gaudineer*, 269 F.3d at 934-35. Similarly, in *Alexander*, the relators, a state prisoner and a former state prisoner, attempted to use a *qui tam* action to challenge Virginia's procedures for conducting inmate drug testing and its process for disposing of urine collected for testing. *Alexander*, 202 F. Supp. 2d at 480. Each of these cases involved a back-door challenge to the operation of a state program.

Stoner will create serious practical problems for the day-to-day operation of any state program that receives or administers federal funds or property. The individual capacity suits authorized by *Stoner* will subject individual state officials to costly and protracted litigation and potentially overwhelming personal liability. They also will permit any person to

bring a back-door challenge to the operation of any state program that receives federal funding.

B. The circuit split created by *Stoner* causes uncertainty for the states as they consider whether and how to participate in federal programs.

The uncertainty created by the circuit split between *Stoner* and *Gaudineer* is of immediate concern to the states and to their officers and employees as they consider whether and how to participate in myriad federal programs. States will be forced to weigh the benefits of accepting a federal grant against the risk that they will be forced to defend a costly and protracted federal *qui tam* action motivated by animus, political disagreement with the targeted program, or the prospect of monetary reward, which seeks to recover three times the amount of the grant. *Cf.* Kovacic, *supra*, at p. 235 (discussing economic impact of FCA on private contractors). The risk of *qui tam* actions will also affect how the states implement federal programs. Cooperative federalism is intended to take advantage of the states' "expertise and judgment" in implementing public programs. *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 449 (4th Cir. 2007). However, the willingness of these state "laboratories of democracy" to try novel or innovative approaches that better serve the public interest will be tempered by the risk that such efforts will serve as magnets for private *qui tam* lawsuits.

This Court should grant certiorari to resolve this uncertainty.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

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No. 07-1336

IN THE

Supreme Court of the United States

COLLEEN B. WILCOX, ET AL.,
Cross-Petitioners,

v.

UNITED STATES EX REL. JOHN DAVID STONER,
Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF NEW MEXICO STATE UNIVERSITY FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF CROSS-PETITIONERS

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No. 07-1336

IN THE

Supreme Court of the United States

COLLEEN B. WILCOX, ET AL., CROSS-PETITIONERS

v.

UNITED STATES EX REL. JOHN DAVID STONER

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF NEW MEXICO STATE UNIVERSITY FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2, New Mexico State University ("NMSU") moves for leave to file the attached *amicus curiae* brief in support of the cross-petition. Cross-Petitioners have consented to the filing of the brief. Petitioner, however, has withheld consent, necessitating this motion.

NMSU's brief is appropriate and will assist the Court in its consideration of this important case. The cross-petition raises a significant question regarding the applicability of the False Claims Act ("FCA") to

state employees acting within the scope of their employment.

NMSU is an active research university, ranking in the top 110 institutions in the country in terms of federal research expenditures, and is a top Department of Defense contractor among Hispanic serving universities. Four of NMSU's past Presidents and other NMSU high level administrators are currently defendants in their individual capacities in a suit under the FCA concerning their certifications of NMSU as a minority institution in applications for federal set aside contracts. The issue of the applicability of the FCA to state employees acting within the scope of their employment is involved in the cross appeal of that case pending before the Tenth Circuit Court of Appeals. *See United States ex rel. Burlbaw v. Orenduff, et al.* 10th Circuit Nos. 05-2393 and 06-2006. NMSU and its staff members would be affected if the Ninth Circuit's flawed decision, in which it dramatically expanded the FCA by holding that state officials are fs"person[s]" subject to *qui tam* suits under the FCA for actions taken within the course and scope of their employment, is allowed to stand.

As explained more fully in NMSU's brief, the Ninth Circuit's decision ignores the intent of Congress when the FCA was enacted in 1863 and would allow *qui tam* litigants to do an end run around this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858 (2000).

Respectfully submitted,

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No. 07-1336

IN THE

Supreme Court of the United States

COLLEEN B. WILCOX, ET AL., CROSS-PETITIONERS

v.

UNITED STATES EX REL. JOHN DAVID STONER

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF NEW MEXICO STATE UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF CROSS PETITION

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INTEREST OF AMICUS CURIAE[1]

New Mexico State University ("NMSU") is a comprehensive land-grant institution of higher learning, founded in 1888 as an agricultural college and preparatory school, NMSU is dedicated to teaching, research, and service at both the undergraduate and graduate levels.

NMSU's statewide system provides learning opportunities through cooperative extension offices in the 33 New Mexico counties, 13 research and science centers statewide, campuses in Alamogordo, Carlsbad, Doña Ana County, Grants and Las Cruces, an Albuquerque Center and distance education programs.

NMSU is a very active research university, with research and public service expenditures exceeding $140 million in 2005-2006. NMSU ranks in the top 110 institutions in the country in terms of federal research expenditures. In addition to its status as a land-grant institution, NMSU also serves as the headquarters for the New Mexico Space Grant Consortium, the New Mexico Water Resources Research Institute, and WERC, a statewide consortium for environmental education and technology development. NMSU is a top U.S. Department of Defense contractor among Hispanic-serving universities. NMSU is the only university to reach the platinum, or highest, level of service to

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[1] This brief was not authored in whole or in part by counsel for either party. No person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief.

NASA's Space Alliance Technology Outreach Program, which makes the expertise of corporate and university researchers available to small businesses.

NMSU has a strong interest in this case. The cross-petition raises a significant question regarding the applicability of the False Claims Act ("FCA") to state employees acting within the scope of their employment. Given NMSU's various government contracts, NMSU and its staff members would be affected if the Ninth Circuit's flawed decision, in which it dramatically expanded the FCA by holding that state officials are "person[s]" subject to *qui tam* suits under the FCA for actions taken within the course and scope of their employment, is allowed to stand.

While this Court's previous decisions have clarified the meaning of "person" under the FCA to exclude states and state employees sued in their "official" capacities, uncertainty remains regarding whether the FCA's use of "person" encompasses state employees named in their "individual" capacities. This very issue is currently involved in the cross appeal of a case before the Tenth Circuit in which four former Presidents of NMSU and other NMSU high level administrators were sued in their "individual capacities" under the FCA in connection with their certifications of NMSU as a minority institution in applications for federal set-aside contracts. *See United States ex rel. Burlbaw v. Orenduff et al.*, 10th Circuit Nos. 05-2393 and 06-2006. As the *Burlbaw* cross appeal involves some of the same issues made the subject of the cross-petition, any resolution by this Court of the issues

raised in the cross-petition could directly impact the outcome of the *Burlbaw* matter, not to mention the administration of numerous federal contract and grant programs involving institutions of higher education, like NMSU.

SUMMARY OF ARGUMENT

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858 (2000), this Court looked to the intent of Congress when the FCA was enacted in 1863 in concluding that Congress did not intend to include states as "persons" under the FCA. Since Congress did not intend the FCA to include states as "persons" when the FCA was enacted in 1863, then state officials acting within the course and scope of their employment are also not to be considered "persons" subject to suit under the FCA, since there was no recognized distinction in 1863 between "official capacity" and "individual capacity" suits.

Moreover, the FCA should not be interpreted in such a way as to authorize a *qui tam* plaintiff to do indirectly that which he cannot do directly by the simple pleading artifice of labeling the claim as one against the official in his individual capacity. Where the state employee was acting within the course and scope of their employment, basic agency principles dictate that the state is liable for the actions and responsible for any money judgment awarded – which in FCA cases, effectively allowing for a punitive award, can be substantial. Accordingly, a suit against a state employee in his "individual" capacity, albeit for actions taken within the course

and scope of his employment, is a suit against the individual state employee in name only, since the real party in interest remains the state entity that employs him.

ARGUMENT

On April 11, 2000, this Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, *supra*, holding that the FCA does not apply to a state or state agency because states are not "persons" covered by the Act. *Id.* at 784-787. A necessary corollary of that decision is that the FCA also does not allow FCA claims against individual governmental employees in their official capacities. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985) ("Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'") (quoting *Monell v. Dept. of Social Services*, 436 U.S. 658, 690, n.55, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)); *also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office," and for this reason "is no different from a suit against the State itself").

Following *Stevens*, *qui tam* litigants attempted to evade this Court's holding by simply recasting what were previously alleged to have been "official" capacity actions as having been taken in the governmental employee's "individual" capacity. If, as the Ninth Circuit's decision suggests, *qui tam* litigants are allowed to circumvent *Stevens* simply by

changing the wording of the caption, this Court's holding in *Stevens* is meaningless.

I. WHEN CONGRESS ENACTED THE FCA IN 1863, IT DID NOT INTEND FOR STATE OFFICIALS PERFORMING THEIR OFFICIAL DUTIES TO BE SUBJECT TO INDIVIDUAL LIABILITY UNDER THE FCA

In *Stevens*, this Court was asked to determine whether a private individual could bring a *qui tam* action against a state under the FCA. *Stevens*, 529 U.S. 765, 768. In answering that question, this Court focused largely on the fact that the FCA was "enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" *Id.* at 781 (quoting *United States v. Bornstein*, 423 U.S. 303, 309, 46 L. Ed. 2d 514, 96 S. Ct. 523 (1976)). The Court then noted that the 1863 version of the FCA "bore no indication that States were subject to its penalties" and that "the text of the original statute does less than nothing to overcome the presumption that States are not covered." *Id.* at 782. The Court went on to note that while "the liability provision of the original FCA has undergone various changes, none of them suggests a broadening of the term 'person' to include States." *Id.* at 782. The Court concluded that there was nothing to suggest that Congress, when the act was drafted in 1863, intended to include states as "persons" under the FCA. Under the clear holding of *Stevens*, the FCA is simply not directed at the conduct of the state.

If Congress did not intend the FCA to include states as "persons" under the FCA in 1863, then it cannot follow that the same Congress nevertheless intended state *officials* to be considered "persons." This conclusion necessarily flows from the fact that, at the time the FCA was enacted in 1863, there was no recognition of separate "official" and "individual" capacities for state officials. Nor did courts recognize that a state official acting within the course and scope of his duties could be held personally liable, since a state could act only through its employees. *E.g.*, *Tenn. v. Davis*, 100 U.S. 257, 263 (1880) (state "can act only through its officers and agents"). It was not settled until well *after* the enactment of the FCA in 1863 that state officials could be subject to personal liability. *See Ex parte Young*, 209 U.S. 123, 159-160 (1908) (settling the issue of 11th Amendment immunity for state officials and holding that, where injunctive damages are at issue, a state official violating federal law "is subjected in his person to the consequences of his individual conduct"); *also Scheuer v. Rhodes*, 416 U.S. 232 (1974) (Congress enacted 42 U.S.C. § 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.") (cited in *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991) ("the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under § 1983")).

Since *Stevens* holds that states are not "persons" under the FCA because, at least in part, there is no indication that Congress so intended in

1863, then state officials are also not "persons" under the FCA, because there is no indication that Congress understood there to be any such thing as a claim for money damages against a state official (acting within the course and scope of his duties) in his "individual" capacity in 1863. As recognized in *United States ex rel. McVey v. Board of Regents of University of California*, 165 F.Supp.2d 1052 (N.D. Cal. 2001), any other reading of the FCA is in conflict with *Stevens*. If Congress intended state officials – but not states – to be subject to suit under the FCA (*i.e.*, a departure from the status quo as of 1863), it would have said so. It did not, leaving no valid basis for the Ninth Circuit's departure from the *Stevens* analysis.

II. A *QUI TAM* SUIT AGAINST INDIVIDUAL STATE EMPLOYEES IS AN UNJUSTIFIED "END RUN" AROUND *STEVENS* AND IGNORES THE REAL PARTY IN INTEREST – THE STATE EMPLOYER

The Ninth Circuit's decision is in open conflict with the decisions of several other courts that have rejected attempts by *qui tam* plaintiffs to bring claims under the FCA alleging personal liability against state officials. For example, in *United States ex rel. Gaudineer & Comito, LLP v. Iowa HHS*, 269 F.3d 932, *rehearing and rehearing en banc denied, cert. denied* 122 S.Ct. 2593 (8th Cir. 2001), the *qui tam* relator originally brought claims against various governmental entities. After this Court's decision in *Stevens* (which effectively dismissed relator's claims), the relator sought to amend to name a state official in his "individual capacity." *Id.* at 934. The relator's proposed amended complaint (naming the state

official in his individual capacity) was almost identical to the original complaint against the governmental entities and the state official in his official capacity. *Id.* at 935. The district court denied the motion to amend and the relator appealed.

On appeal, the state official argued that since he did not act outside of the scope of his duties, he was not a "person" under the FCA because the state was the real party in interest, meaning the claims were barred by the Eleventh Amendment in any event. *Id.* at 936. The Eighth Circuit agreed and declined to adopt relator's argument that the term "person" under the FCA should be construed the same as "person" under 42 U.S.C. § 1983. *Id.* The Eighth Circuit also rejected the dissent's and the relators' argument that *Hafer v. Melo* (discussing "individual" versus "official" capacity claims) meant the amendment should be granted as a matter of right. Instead, the Eighth Circuit reasoned that, in determining whether a state official may be liable for money damages in his individual capacity, courts should not rely wholly on "the elementary mechanics of captions and pleading." *Id.* at 937 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270, 117 S. Ct. 2028 (1997)). "It is not enough for a relator to simply label the claim as one against the official in his individual capacity." *Id.* at 937 (internal citation and quotation omitted).

A state can act only through its officers and agents. *Nev. v. Hicks*, 533 U.S. 353, 365 (2001) (State can act only through its officers and agents); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 (1984) ("an American State can act only

through its officials") (superceded on other grounds by 28 U.S.C. § 1367 as stated in *Raygor v. University of Minn.*, 604 N.W.2d 128, 133 (Minn. Ct. App. 2000)); *Terry v. Midwest Refining Co.*, 64 F.2d 428, 434 (10th Cir. 1933) ("the state could act only through officers or agents"). Since states take no actions independent of the actions of their agents, *Stevens* and the 11th Amendment cannot be properly evaded by a *qui tam* litigant simply asserting that the state employees were acting in their "individual" capacities. The "mere incantation of the term 'individual capacity' is not enough to transform an official capacity action in to an individual capacity action." *Lizzi*, 255 F.3d at 137 (citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 (1985)); *Coeur d' Alene Tribe of Idaho*, 521 U.S. at 270 ("the real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading.").

Accordingly, even when a complaint expressly names a state official is his or her "individual" capacity, the 11th Amendment will still bar the suit if the state is the real party in interest. *Halderman*, 465 U.S. at 101. Under basic agency principles, a principal is liable for the tortious misrepresentations (*i.e.*, fraud) of the agent if the representation is authorized, apparently authorized, or within the power of the agent to make for the principal. Restatement (2d) Agency, § 257. Further, an employer is responsible for the fraudulent conduct of an employee under the same standard. *Id.*, § 249; *also Taylor v. Phelan*, 912 F.2d 429, 433 (10th Cir. 1990); Restatement (3d) Agency, § 7.07. Thus, unless there is some allegation that the governmental

employees were acting outside the course and scope of their employment, the governmental entity remains the real party in interest for any claim of money damages.

The Ninth Circuit improperly ignored this legal reality. Under its decision, a state official could be acting within the course and scope of his duties and still violate the FCA, thereby subjecting the state to damages. However, the reality is that the perfunctory act of labeling conduct as being performed in the official's "individual" capacity does not magically transform a suit from one against the state to one against an individual. *See Bender*, 475 U.S. at 543; *Lizzi*, 255 F.3d at 136-137; *Wilson v. Graham County Soil and Water Conservation Dist.*, 224 F.Supp.2d 1042, 1049-50 (W.D.N.C. 2002). The state remains the real party in interest.

Indeed, if a state can act only through its employees, and if the state is legally responsible for actions by its employees taken within the course and scope of their duties, then a suit against a state employee for actions taken within the course and scope of his duties is different than a suit directly against the state in name only. To hold that individual state officials (acting on behalf of the state and within the course and scope of their duties) can be sued under the FCA, while also recognizing that the FCA prohibits the state itself from being sued, completely undermines this Court's decision in *Stevens*, and allows *qui tam* plaintiffs to easily skirt the Eleventh Amendment protection that states (the real parties in interest) would otherwise enjoy. Even though *Stevens* clearly says that an FCA suit against

a state is not allowed (in substantial part because of the punitive nature of damages that the state would be forced to incur under the FCA), the Ninth Circuit's ruling means that *qui tam* plaintiffs can effectively ignore *Stevens* and recover from the state the exact damages that *Stevens* says states are not liable for under the FCA.

The Ninth Circuit justified its ruling by suggested that *not* allowing state employees to be sued in their "individual" capacities would be tantamount to granting absolute immunity to all state employees, for FCA purposes. To the contrary, allowing *qui tam* suits against individual state employees creates an exception to the state's sovereign immunity which is not warranted by the FCA or *Stevens*. Indeed, the Ninth Circuit's simplistic assumption that disallowing *qui tam* suits against government employees would equal "absolute immunity" for the actions of a state official overlooks the vast array of common law remedies[2] that the

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[2] *See, e.g., United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 6 (1st Cir. 2005) (United States filed an action under 28 U.S.C. § 1345 against hospital alleging "violations of the common law giving rise to causes of action for unjust enrichment and payment under mistake of fact."); *United States v. Mead*, 426 F.2d 118, 124-25 (9th Cir. 1970) (common law remedy of payment by mistake not abrogated by False Claims Act's statutory remedies); *United States v. Borin*, 209 F.2d 145, 148 (5th Cir.) (common law remedy of fraud not abrogated by False Claims Act's statutory remedies), *cert. denied*, 348 U.S. 821, 99 L. Ed. 647, 75 S. Ct. 33 (1954); *United States v. Silliman*, 167 F.2d 607, 610-11 (3d Cir.) (common law remedies not abrogated by False Claims Act), *cert. denied*, 335 U.S. 825, 93 L. Ed. 379, 69 S. Ct. 48 (1948).

federal government has at its disposal when it believes it have been wronged, which remedies are not in any way tied to the meaning of "person" under the FCA or to the Eleventh Amendment.

III. IF SUIT IS TO BE ALLOWED AT ALL, *QUI TAM* PLAINTIFFS SHOULD BE REQUIRED TO ALLEGE AND SHOW PERSONAL GAIN BY THE INDIVIDUAL STATE EMPLOYEES

Even if state employees are deemed "persons" under the FCA and subject to suit, in order to avoid a situation in which *Stevens* is rendered virtually meaningless, and in order to prevent litigants from doing an improper "end run" around the Eleventh Amendment, *qui tam* plaintiffs should be required to show some personal gain by the state employees.

For instance, in *United States ex rel. Honeywell, Inc. v. San Francisco Housing Authority, et al.*, 2001 U.S. Dist. LEXIS 9743 (N.D. Ca. 2001) the court granted a motion to dismiss the FCA complaint against public officials in their personal capacity, concluding that such a suit may not be maintained without an allegation that the officials "personally benefited from the freeze benefit obtained from HUD." *Id.*, at * 11. The court noted that any such benefit remained with the San Francisco Housing Authority (employer of the public officials), and explained that: "Given the allegations in the Complaint, it does not appear that Honeywell could amend the Complaint to allege personal gain." *Id.* at *14 n. 4.

In *Alexander v. Gilmore*, 202 F.Supp.2d 478 (E.D. Va 2002), Plaintiffs alleged that the Virginia Department of Corrections made false certifications and representations to the federal government in order to receive federal grants. The certifications were signed by state employees. Plaintiffs sued these and other Virginia public officials under the FCA in their "individual" capacities. The court emphasized that the complaint did not contain any facts that suggested that the officials who signed and submitted the federal grant application were acting in anything other than their official capacities. *Id.* at 482. Then, relying on *Smith v. United States*, 287 F.2d 299 (5th Cir. 1961), in which the Fifth Circuit noted that FCA claims against government officials in their personal capacities should rest on allegations of personal gain, the court dismissed the complaint for failure to state a claim because there were "no allegations that [individual defendants] converted funds from VOITIG (the federal grant program) to their personal use." *Alexander*, 202 F.Supp.2d at 482; *see also United States ex rel. Graber v. City of New York*, 8 F.Supp.2d 343 (S.D.N.Y. 1998) (stating that suit under FCA could not be brought against public officials absent allegations they personally received funds paid by federal government on basis of alleged false claims); *United States ex rel. Kinney v. Stoltz*, No. CIV. 01-1287, 2002 WL 523869 at *7 n. 3 (D. Minn. April 5, 2002) (stating that officials must have personally benefited from the alleged submission of false claims to Medicare before suit under FCA is anything other than one against the governmental employer); *United States ex rel. Dunleavy v. County of Delaware*, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa. Oct. 12, 2000) (no allegation that official acted for his

own benefit, profited at the public's expense, spent the money at issue for any non-public purpose, or acted in any capacity other than his official one); *Lane v. Texas Dep't of Health*, 2003 Tex. App. LEXIS 6524, * 17-18 (Ct. App. – Third Dist., Austin July 30, 2003) (holding that "even if individual state officials or employees are sued in their individual capacities, no FCA liability arises unless there is evidence that the official or employee converted the federal funds or property to their own personal use or benefit.").

A rule imposing individual liability on state officials acting within the course and scope of their duties simply because they are sued that way "would do nothing more than adhere to an empty formalism" that other courts have rightly rejected. *Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) (internal citations omitted). Absent a requirement of a showing of personal gain, the Ninth Circuit's ruling means that state officials can be held personally liable even though the state was the only entity benefiting from the alleged FCA violation. This Court has previously noted the absurdity of such a holding in other contexts. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (U.S. 1978) (in deciding that municipalities can be held liable under § 1983, stating: "it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity rather than from the government unit that had the benefit of the property taken."). In rejecting the requirement that *qui tam* plaintiffs allege and show some sort of personal benefit to the individual defendants, the Ninth Circuit allowed for the FCA and *Stevens* to be

interpreted so as to reach an equally illogical result. *See, e.g., Dodd v. United States*, 545 U.S. 353 (U.S. 2005) (J. Stevens, dissenting) (even clear text should be interpreted in a manner that avoids an absurd result) (citing *Clinton v. City of New York*, 524 U.S. 417, 429, 141 L. Ed. 2d 393, 118 S. Ct. 2091 (1998) and *Church of Holy Trinity v. United States*, 143 U.S. 457, 459, 36 L. Ed. 226, 12 S. Ct. 511 (1892)).

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted and the Ninth Circuit Court of Appeals' holding that state employees may be sued in their individual capacities under the FCA for actions taken in the course of their official duties should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

COLLEEN B. WILCOX, ET AL.,
Cross-Petitioners

v.

UNITED STATES EX REL. JOHN DAVID STONER,
Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF STATE AGENCIES AS *AMICI CURIAE* IN SUPPORT OF CROSS-PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Amici curiae are state social service agencies responsible for administering complex federal-state programs. (A list of *amici* appears on the inside cover of this motion.) *Amici* respectfully move for leave to file the attached brief. The attorney for cross-petitioners has consented to the filing of this brief. *Amici* requested the consent of the cross-respondent, Mr. Stoner, but he refused to consent.

Amici have a strong interest in this case. The Ninth Circuit reversed the district court's dismissal of counts under the False Claims Act, 31 U.S.C. §§ 3729-33, brought against three public officials in their individual capacities. The courts below considered the agencies that employed these officials to be arms of the State of California. If state officials can be subjected to the threat of litigation and held personally liable under the False Claims Act, the greatest potential liability for such suits will arise in connection with the federal-state programs administered by *amici*.

If allowed to stand, the decision below will disrupt the state agencies' implementation of federal-state programs by undermining the intricate relationships between the federal and state governments in the administration of these programs. If state employees responsible for administering federal-state programs face the threat of potentially massive personal liability under the False Claims Act, state agencies will have difficulty

recruiting and retaining qualified candidates for these essential positions.

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The state agencies listed below respectfully submit this brief *amicus curiae* in support of cross-petitioners in this case.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are state social service agencies responsible for administering complex federal-state programs. States play an important role in administering many federal programs, including Medicaid, Temporary Assistance to Needy Families (TANF), Emergency Assistance, Child Support Enforcement, Foster Care and Adoption Assistance, the Child Health Insurance Program, and Food Stamps. States that choose to operate within the parameters set out in the governing federal statute are entitled to claim federal funding to cover some percentage of their programmatic and administrative expenditures.

Amici have a strong interest in this case. The Ninth Circuit reversed the district court's dismissal of counts under the False Claims Act, 31 U.S.C. §§ 3729-33, brought against three public

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity, other than *amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Counsel of record for all parties and cross-respondent received notice at least 10 days prior to the filing of this brief. Mr. Stoner did not consent to the filing of this brief. Thus, *amici* file this brief with a Motion for Leave to File Brief as *Amici Curiae*.

employees in their individual capacities. These individuals, employees of the Santa Clara County Office of Education, are responsible for implementing a federal program — the Individuals with Disabilities Education Act — as part of their official duties. The plaintiff (cross-respondent here) asserted that these employees falsely certified compliance with this statute to obtain more federal funds for educational programs. Both the district court and the court of appeals held that a California county office of education is an arm of the State for purposes of this case. Appendix to Cross-Petition ("Pet. App.") 6a-7a.

If state officials can be subjected to the threat of litigation and held personally liable under the False Claims Act, the greatest potential liability for such suits will arise in connection with the federal-state programs administered by *amici*. These are the programs that generate the greatest volume of claims submitted to the federal government. State officials are regularly called upon to interpret and implement numerous federal statutes and regulations in determining the amount of federal funds a State may claim in connection with these programs.

If allowed to stand, the decision below will disrupt the state agencies' implementation of federal-state programs by undermining the intricate relationships between the federal and state governments in the administration of these programs. If state employees responsible for administering federal-state programs face the threat of potentially massive personal liability under the False Claims Act, state agencies will have difficulty

recruiting and retaining qualified candidates for these essential positions.

STATEMENT

1. *Amici* state agencies administer numerous federal-state programs. These programs, most of which involve provision of services to individuals, are largely administered by the States and are partially supported by the federal government through federal financial participation. These programs include, among many others, Medicaid, 42 U.S.C. §§ 1396 *et seq.*, TANF, 42 U.S.C. §§ 601 *et seq.*, and Food Stamps, 7 U.S.C. §§ 2011 *et seq.* Individual state officials must make numerous policy decisions about how these programs will be implemented in accordance with a multitude of federal statutory and regulatory guidelines. State employees also must determine the amount of federal funds that may properly be claimed under these programs. For most federal-state programs, Congress and the responsible federal agencies have established extensive schemes governing compliance, audit, disallowance of claims, and repayment of any federal funds incorrectly claimed. *See, e.g.*, 42 U.S.C. § 1396(c) (Medicaid); 42 U.S.C. § 609 (TANF); 7 U.S.C. § 2020(g) (Food Stamps).

The federal government disburses huge sums in connection with these federal-state programs. Federal grants to state and local governments doubled from $115 billion in 1988 to $230 billion in 1997. *See* U.S. Department of Commerce, Bureau of the Census, Publication FES/97, Federal Expenditures by State for Fiscal Year 1997 at 46, Table 11 (April 1998). By 2005, this figure had grown to over $403 billion. *See* U.S.

Department of Commerce, Bureau of the Census, Publication FAS/05, Federal Aid to States for Fiscal Year 2005 at v (2005). Medical assistance programs (including Medicaid) and TANF accounted for over half of this amount. *See id.* at viii, figure 3.

2. The False Claims Act provides that "any person" who knowingly presents a false or fraudulent claim for federal funds is liable to the United States for a civil penalty of up to $10,000 per claim and treble damages. 31 U.S.C. § 3729(a). Suits under the False Claims Act may be brought either by the United States, or by a private individual on behalf of the United States (a "qui tam relator"), *id.* § 3730(b). If a relator brings the suit, the United States has the opportunity to intervene and direct the case. *Id.* § 3730(b)(2) & (4). If the United States declines to intervene, the relator may continue to pursue the suit on behalf of the government. *Id.* § 3730(b)(4)(B). In either case, if the suit is successful, the relator receives a portion of the recovery, generally between fifteen and twenty-five percent. *Id.* § 3730(d).

3. This False Claims Act suit was brought against the Santa Clara County Office of Education, the East Side Union High School District, and three employees of the Santa Clara County Office of Education who were sued in their official and individual capacities. Pet. App. 11a. The relator, John David Stoner (cross-respondent here), alleged that the defendants submitted false certifications of compliance with the Individuals with Disabilities Education Act, which in turn allegedly caused the federal government to provide additional federal funds for educational programs. *Id.* at 3a. The United States declined to intervene. *Id.* at 4a. All of

the defendants then moved for dismissal on the ground that they are not "persons" under the False Claims Act. *Id.*

The district court granted dismissal as to all defendants. The court held that the Office of Education and the high school district were arms of the State and thus are not subject to liability under the False Claims Act. *Id.* at 6a-7a; *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000) (States are not "persons" under the False Claims Act). The claims against the individual defendants in their official capacities were dismissed under a similar rationale. Pet. App. 11a (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (official capacity suit for money damages is suit against the State itself)). Finally, the district court dismissed the personal capacity claims against the individual defendants because the relator "could not allege that the defendants' actions exceeded the scope of their official responsibilities." Pet. App. 12a.

4. The Ninth Circuit agreed that the claims against the Office of Education, the high school district, and the individual defendants in their official capacities were properly dismissed. It held, however, that the individual defendants could be sued in their personal capacities under the False Claims Act for actions taken within the scope of their duties. *Id.* at 12a-13a. In reaching this conclusion, the court of appeals relied heavily on *Hafer v. Melo*, 502 U.S. 21, 27-31 (1991), in which this Court construed the term "person" as it is used in a civil rights statute, 42 U.S.C. § 1983. Pet. App. 13a-15a.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding that a False Claims Act suit may proceed against state employees in their individual capacities is erroneous and dangerous. There is no evidence that Congress intended the term "persons" under the False Claims Act to include state officials, particularly in view of this Court's holding that States themselves are not covered by the statute. The Ninth Circuit's holding is also sharply at odds with the reality that state employees are likely to be public-spirited individuals of modest means. It is simply not credible to conclude that Congress meant to expose such employees to the threat of massive damages and penalties under the False Claims Act. At a minimum, there is no basis for such a suit against a state employee in his personal capacity where the employee acted within the scope of his official responsibilities and not for his own personal financial gain. The Ninth Circuit's decision is inconsistent with the approach taken by the Eighth Circuit and by district courts in other circuits. Moreover, False Claims Act suits against state employees would be inconsistent with the statutory and regulatory framework of numerous programs jointly administered by federal and state officials.

If the decision below is allowed to stand, it will impair the administration of federal-state programs that provide necessary services to citizens and will cause serious administrative problems for state agencies. State officials will face the threat of devastating financial liability when they submit claims for federal funds to help support social services in accordance with their job duties. Even a

remote possibility of such crippling liability will make it difficult for state agencies to recruit and retain qualified candidates for these positions. These serious consequences both support grant of the petition and demonstrate the error of the decision below to the extent it permits a False Claims Act suit against state officials.

ARGUMENT

The undersigned state agencies urge the Court to grant review to address a question of great significance to them, whether state officials may be sued in their individual capacities under the False Claims Act. The decision of the Ninth Circuit, which holds that such suits may be brought, makes little sense. States themselves are not covered by the False Claims Act. There is no reason to think that Congress intended that state employees — ordinarily public-spirited individuals of modest means — would face the threat of onerous liability under the statute, at least in cases where the employee has acted within the scope of his or her official duties and not for personal financial gain.

The Ninth Circuit holding is at odds with the approach taken by the Eighth Circuit and other courts. Moreover, if allowed to stand, the decision below will seriously undermine state agencies' ability to administer numerous federal-state programs. *Amici* therefore request that this Court grant the petition for a writ of *certiorari* and reverse the decision below to the extent it permits a False Claims Act suit against state officials.

I. The Decision Below Is Inconsistent with Congressional Intent and with the Approach Taken by Other Federal Courts.

A. There Is No Evidence that Congress Intended the False Claims Act to Cover State Officials Sued in Their Personal Capacities.

The Ninth Circuit concluded that the term "person" in the False Claims Act is broad enough to include state officials sued in their individual capacities. But the history and the broader context of the statute suggest otherwise, as does common sense. There is no indication that Congress intended the False Claims Act to reach state officials, even when they are sued in their individual capacities.[2]

While the language of the statute is broad, "it is . . . clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). As this Court has recognized, when Congress enacted the False Claims Act in 1863, its goal was to stop "the massive frauds perpetrated by large [private] contractors during the

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[2] This Court has noted that the term "person" "presumptively" includes natural persons. *Stevens*, 529 U.S. at 784 n.14; *see also* 1 U.S.C. § 1. However, the context of a particular provision may overcome such a presumption. *See, e.g., Deal v. United States*, 508 U.S. 129, 132 (1993); 1 U.S.C. § 1 (definitions in the Dictionary Act are to be applied unless "the context [of any Act of Congress] indicates otherwise").

Civil War." *Stevens*, 529 U.S. at 781 (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)) (alteration in original); *see also United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998) (purpose of False Claims Act was "to address war fraud by private contractors"). The United States had been billed for nonexistent or worthless military goods, and Congress sought to stem the tide of fraud by enacting the False Claims Act. *See* 62 Cong. Globe 952-58 (1863). Thus, the goal was to reach *private* contractors. There is no indication that Congress wanted to cover state officials who administered federal programs.[3]

The Ninth Circuit holding makes little sense unless one assumes that state employees are out to bilk the federal government in connection with their administration of federal programs and that onerous penalties and treble damages are necessary deterrents in this setting. But there is no reason to conclude that Congress would have had this view. Experience suggests that state employees are generally public-spirited individuals who are not looking for personal financial gain at the expense of the federal government. Moreover, state employees are not generally wealthy; their personal financial

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[3] A year before enactment of the False Claims Act, Congress issued a report on the extensive fraud being perpetrated by private contractors during the Civil War. H.R. Rep. No. 2, 37th Cong., 2d Sess., pt. ii-a (1862). That report included mention of fraud by a state official against the federal government. *Id.* at xxxvii-xxxix. This Court noted, however, that the report in question "is utterly irrelevant, since it was not prepared in connection with the 1863 Act, or indeed with any proposed false claims legislation." *Stevens*, 529 U.S. at 783 n.12.

resources are usually quite limited. It is not plausible to think that Congress intended that these public servants would face the threat of devastating financial liability under the False Claims Act.

Moreover, the conclusion that state officials are subject to suit makes little sense in view of settled boundaries on the reach of the False Claims Act. This Court held in *Stevens* that States and state agencies are not covered by the term "person" as it is used in the False Claims Act. 529 U.S. at 787. Thus, States and state agencies are not subject to liability under the statute in connection with receipt of federal grant funds.

If States that submit claims for federal funds under grant programs are not subject to suit under the False Claims Act, there is no reason to think that Congress intended the statute to reach the state officials who administer such programs for the States. State officials are the instrumentality or agent by which States submit claims for federal funding. Like the States themselves, state officials who claim federal funds on behalf of a State in the normal course of their duties must be beyond the reach of the statute. To impose liability on such officials for undertaking their responsibilities on behalf of the State would be at odds with this Court's conclusion that Congress did not intend to cover States under the statute.

Indeed, the decision below might be best described as an end-run around this Court's holding in *Stevens*. In the context of claims for federal funding under a joint federal-state program, a suit against a state official in his or her individual capacity is essentially an attack on state policy and

state administrative decisions, not on the actions of a particular state official. The threat of False Claims Act liability for a state employee's claims for federal funding could pressure the State to alter its administrative and policy decisions in connection with federal programs and to fund settlements with relators through indemnification. Relators' efforts to recover damages from individual state administrators, in amounts that would clearly be beyond the capacity of these individuals to bear, amount to an effort to obtain through the back door a form of relief against the State that *Stevens* precludes.

In the context of the Fair Labor Standards Act, the Seventh Circuit has recognized that suits against state officials in their personal capacities should not be allowed where those suits are "really and substantially . . . against the state." *Luder v. Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2000) (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997)). This occurs when "the effect of the judgment [is] to restrain the Government from acting, or to compel it to act." *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)). *Luder* involved a suit for back wages allegedly owed to state employees, brought against state officials in their individual capacities. The court held that this suit, which sought damages that "obviously exceed[] the ability of [the state officials] to pay," *id.* at 1024, in fact was aimed at the State, *id.* If the State did not indemnify the officials, they would have to declare bankruptcy and either quit or comply with the plaintiffs' demands. If they quit, new employees

would face similar pressures. *Id.* The court barred the suit because "[the plaintiffs] are seeking to force the state to accede to their view of the Act." *Id.*

The situation faced by States and state officials under the False Claims Act is similar to that in *Luder*. Because of the treble damages provision of the statute and because of the magnitude of the sums that flow from the federal government to fund joint federal-state programs, no state employee could personally bear liability for filing a claim that resulted in an overpayment to the State. Whether or not the State indemnified the official, it would face pressure to comply with a relator's demands that it alter the administration of a federal-state program. Accordingly, in the case of the False Claims Act, suit against a state official in his or her personal capacity is in essence a suit against the State and should be barred under *Stevens*.

B. A State Official Who Is Not Alleged to Have Acted for Private Financial Gain Is Not Covered by the False Claims Act.

At a minimum, state officials should not be subject to suit in their personal capacities under the False Claims Act where they acted within the scope of their duties and not for personal financial benefit. As discussed above, Congress's goal in enacting the False Claims Act was to stop fraudulent claims by private contractors. Only state employees acting outside of their official duties and for their own personal gain could plausibly be considered analogous to private contractors who submit fraudulent claims to the federal government.

There is no allegation that the employees here acted in any way outside of their official duties, or that they were motivated in any respect by personal financial gain. Stoner alleged that the supposedly false certifications of compliance "induce[d] the government to disburse more money for certain educational programs." Pet. App. 3a. Thus, all of the federal funds at issue here were to go to the benefit of the federal-state program, not to the benefit of the individual defendants. It is utterly implausible that Congress would have intended that state employees be subject to a False Claims Act suit in these circumstances.

The court of appeals' conclusion that a relator need not allege actions outside of an official's authority or motivation by personal financial gain to maintain a False Claims Act suit against a state official is inconsistent with the approach taken by the Eighth Circuit. In *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001), a relator brought a False Claims Act suit against a state employee in his individual capacity. The relator alleged that the employee had induced the federal government to continue making Medicaid payments for services to certain individuals even though he knew they were no longer eligible for such payments. The Eighth Circuit dismissed the claim, holding that because the relator did not "allege[ ] actions outside [the state employee's] official duties as administrator of the waiver program," the employee could not be personally liable. *Id.* at 937.

This Court's decision in *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986),

supports the Eighth Circuit approach. In *Bender*, a school board member sought to appeal in his personal capacity a decision allowing a prayer club to meet during school hours. *Id.* at 541. The Court held that the member did not have standing to appeal in his personal capacity. Although the complaint alleged claims against the member "in [his] individual and official capacities," the Court held that the "course of proceedings" indicated that no relief was actually sought against the member in his personal capacity. *Id.* at 543; *see also Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) (quoting *Bender*, 475 U.S. at 543) ("[t]he mere incantation of the term 'individual capacity' is not enough to transform an official capacity action into an individual capacity action"), *overruled on other grounds, Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Other courts have dismissed False Claims Act suits against officials in their individual capacities where there was no allegation of personal profit. *See, e.g., United States ex rel. Dunleavy v. County of Del.*, 279 F.3d 219, 221 (3d Cir. 2002) (local government employee not subject to False Claims Act suit when employee does not personally benefit from transaction constituting violation), *rev'd on other grounds*, 538 U.S. 918 (2003); *Alexander v. Gilmore*, 202 F. Supp. 2d 478, 482 (E.D. Va. 2002) (complaint failed to state cause of action under False Claims Act where no allegation that defendants converted funds to their personal use); *Graber*, 8 F. Supp. 2d at 356 (rejecting individual capacity suit under False Claims Act where there was no suggestion that official personally profited from

alleged fraud and all monies were used for foster care program). The decision below is inconsistent with these decisions. The Court should grant review to clarify that state employees who do not seek personal benefit or otherwise act outside the scope of their official duties are not subject to a False Claims Act suit.

C. The Ninth Circuit Erred in Relying on *Hafer v. Melo*.

Presumably recognizing that there is no support in the statute itself or in its history for allowing False Claims Act suits against state officials, the Ninth Circuit turned to this Court's precedent regarding a different cause of action: claims under 42 U.S.C. § 1983. Pet. App. 13a-15a. This Court has held that Section 1983 imposes liability for actions taken under the color of state law that violate constitutional or statutory rights "whether [officials] act in accordance with their authority or misuse it." *Hafer v. Melo*, 502 U.S. 21, 22 (1991). Under *Hafer*, state officials acting under the color of state law are not shielded from personal liability for violation of constitutional or statutory rights simply because they acted in the course of their duties. *Id.* at 31. The Court concluded that holding that officials were not subject to personal liability under Section 1983 where they acted within the scope of their duties would be equivalent to granting them absolute immunity. *Id.* at 28-29. Because absolute immunity is granted only to those "whose special functions or constitutional status requires complete protection from suit," *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), the Court

declined to read Section 1983 to preclude liability for state officials sued in their individual capacities.

The court below erred in relying on *Hafer*. Section 1983 and the False Claims Act are very different statutes. In enacting Section 1983, Congress specifically intended to reach actions by state officials. *Hafer*, 502 U.S. at 28 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974)); *see also Monroe v. Pape*, 365 U.S. 167, 172 (1961). In contrast, Congress enacted the False Claims Act to reach fraud committed by private contractors against the federal government. *See* page 8-9, *supra*. Thus, there is no reason to construe the two statutes in a similar way.

Moreover, the framework of the False Claims Act itself suggests that *Hafer* is irrelevant here. *Hafer* addressed actions of a state official acting within the scope of her authority. It would be impossible, however, for a state official acting within the scope of her authority to violate the False Claims Act, which addresses actions *knowingly* taken to defraud the federal government. 31 U.S.C. § 3729(a). Only a state official acting outside of the scope of her authority could knowingly submit a false claim to the federal government. Because conduct of state officials acting within the scope of their authority could not constitute a knowing act of fraud against the federal government, *Hafer* is inapplicable.

II. The Decision Below Is Incompatible with the Framework for Administration of Federal-State Programs.

The Ninth Circuit's interpretation of the False Claims Act to apply to state officials sued in

their individual capacities is incompatible with Congress's framework for joint federal-state programs. The programs jointly financed by the federal and state governments represent the largest source of federal funds paid to (and claimed by) the States. In general, federal officials oversee such programs, but state officials are responsible for filling in details and administering the program on a day-to-day basis. The governing federal laws and regulations and implementing state laws and regulations that together provide the framework for federal-state programs are notoriously complicated.

Given the complexity of the statutory and regulatory framework for federal-state programs, it is almost inevitable that States on occasion will claim more federal funds than federal officials think is authorized. Congress and federal agencies have developed a comprehensive administrative framework to handle disagreements about whether a State claimed the proper amount of federal funds. Disputes that cannot be handled through negotiation (most of them are) move through a multi-step administrative process in which the position of the federal agency is fully aired and evaluated before the matter proceeds to federal court. It is not unusual for some issues of particular importance to the States or the federal government to be resolved politically or through legislation.

This system of cooperative federalism is well illustrated by the Medicaid system, "as complex a legislative mosaic as could possibly be conceived by man." *City of New York v. Richardson*, 473 F.2d 923, 926 (2d Cir. 1973). States received over $172 billion in federal funds for Medicaid alone in 2005. *See* U.S.

Department of Commerce, Bureau of the Census, Publication FAS/05, Federal Aid to States for Fiscal Year 2005, at Appendix A, A-7 (2005). The Department of Health and Human Services ("HHS") and its Centers for Medicare and Medicaid Services ("CMS") oversee the program, but the States administer the program and receive federal funds to match amounts the States spend for medical assistance to low-income individuals. The Secretary of HHS is charged with approving state plans and state plan amendments, and regional offices of CMS serve as the States' primary contact in their respective regions.

A CMS regional office works with the States in its region to ensure that they are in compliance with federal statutory and regulatory requirements. The regional offices are also responsible for approving the States' claims for federal financial participation. As this Court noted, "[a]lthough the federal contribution to a State's Medicaid program is referred to as a 'reimbursement,' the stream of revenue is actually a series of huge quarterly advance payments that are based on the State's estimate of its anticipated future expenditures." *Bowen v. Massachusetts*, 487 U.S. 879, 883-84 (1988); *see also* 42 U.S.C. § 1396b(d). These estimates are periodically adjusted to reflect actual experience, so that overpayment amounts from one period are withheld from advances in a subsequent period. 42 U.S.C. § 1396b(d)(5).

A State reconciles its quarterly advances and actual expenditures through a quarterly expenditure report submitted to its regional office. 42 C.F.R. § 430.30(c). If the regional

office questions the allowability of a State's claim, CMS may "defer" payment of the claim. 42 C.F.R. § 430.30(c). Deferral is accomplished by excluding the questioned amount from the grant award pending further review. 42 C.F.R. § 430.40(b).

If a regional office ultimately determines that a State's claim is improper, CMS will "disallow" the claim. 42 C.F.R. § 430.42. The State may appeal the disallowance to the HHS Departmental Appeals Board. 42 C.F.R. § 430.42(b), (c). If the Board's decision requires an adjustment of the amount received by the State, either upward or downward, a subsequent grant award will reflect the amount of increase or decrease. In the event of a decrease (*i.e.*, a "repayment" due to the disallowance of federal funds the State had previously drawn), the regulations specify various timetables for repayment that ensure that the financial integrity of the State's program will not be threatened. 42 C.F.R. § 430.48. A State may seek review of a disallowance decision in federal district court. *Bowen*, 487 U.S. at 892.

There is no reason to think that Congress anticipated that the orderly processes Congress itself and federal agencies established for dealing with overpayments under federal-state programs would be supplemented (and distorted) by a *qui tam* relator's suit. Such suits will interfere with the proper administration of federal-state programs. False Claims Act suits against state officials, even in their personal capacities, may create pressure for changes in the States' administration of their policies as States attempt to resolve such suits. Where the United States does not intervene in a suit brought by a relator, these

changes will be directed not by the federal government in accordance with Congress's intent regarding money granted to the States; rather, they will be directed by a private citizen. Relators will not be motivated to ensure that federal funds provided to the States are spent consistently with congressional intent; instead, they will focus on their own monetary interests. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) ("relators are motivated primarily by prospects of monetary reward rather than the public good"). The result will be an overlay of private interests on the administrative schemes that govern joint federal-state programs.

Moreover, the framework of the False Claims Act is antithetical to the approach Congress has taken to complex federal-state programs. The False Claims Act is a litigation-based scheme, with a focus on liability, penalties, and treble damages and largely enforced by private citizens. The administrative framework for handling overpayments of federal funds in federal-state programs is quite different. As this Court has noted, administrative disallowances are not "damages," but instead simply "adjustments" in the amount of a federal grant to the State. *Bowen*, 487 U.S. at 892. Taking what might otherwise be a disallowance and trebling it and imposing large penalties on top plainly distorts the division of financial responsibility and the cooperative system that underlies the administration of federal-state programs. The distortion is even more extreme when the extra financial liability is imposed on an

individual state official responsible for administering the program.

False Claims Act suits brought by relators against state officials are a manifestly unsuitable means to answer questions regarding the proper division of financial obligations between the state and federal governments. There is no need to add the threat of such suits to existing federal schemes to ensure compliance with federal law.

III. If Not Reversed, the Decision Below Will Severely Impact State Program Administration.

Unless this Court grants review and reverses the holding that state officials may be sued in their individual capacities, the decision below will cause severe negative consequences for state agencies and state officials charged with administering federal-state programs. Damages and penalties under the False Claims Act are potentially massive, particularly in connection with administration of a large federal program like Medicaid. An individual state employee could never pay such amounts from his or her own pocket. At least in the Ninth Circuit, state officials will likely perceive that any action to draw down federal funds under a federal-state program could lead a relator to file a False Claims Act suit. State officials in other circuits may well fear that other courts will follow the Ninth Circuit's lead.

Even a remote threat of massive personal liability under the False Claims Act will likely dissuade qualified professionals from public service. State agencies need expert administrators

to manage the many complex federal-state programs that provide services to millions of state residents. Decisions about what federal funds the State may properly claim in connection with a program or about policies that will affect the amount of such claims require state officials to interpret complex federal laws and regulations, and reasonable minds can differ regarding federal requirements. It will be difficult for state agencies to administer such programs efficiently with the threat of massive personal damages looming for state officials who implement the programs. The federal government, too, will be harmed if the threat of personal liability dissuades qualified state professionals from accepting positions as federal-state program administrators.

The Ninth Circuit suggested that a state official sued in his or her individual capacity under the False Claims Act might be able to assert a qualified immunity defense. Pet. App. 15a n.3; *see also Gaudineer*, 269 F.3d at 940 (dissent). The prospect that a state official might ultimately be able to prevail on a qualified immunity defense is not sufficient to avoid the harms identified above. The application of the qualified immunity doctrine to a False Claims Act suit against state officials is not well established. Indeed, the only court of appeals to consider the issue to date held that state officials are not entitled to qualified immunity under the False Claims Act, at least in connection with the anti-retaliation provisions of the statute. *See Samuel v. Holmes*, 138 F.3d 173, 178 (5th Cir. 1998). A federal district court has held that qualified immunity is available to state officials sued under the False

Claims Act, but that decision is on appeal. *See United States ex rel. Burlbaw v. Orenduff*, 400 F. Supp. 2d 1276, 1281-89 (D.N.M. 2005), *appeal docketed*, No. 05-2393 (10th Cir. argued Mar. 5, 2007).

Moreover, in *Burlbaw* the court decided the qualified immunity issue only after discovery and development of a factual record. *See id.* Qualified immunity is meant to be an immunity from suit, not merely a defense to liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). But under the district court's analysis in *Burlbaw*, it is difficult for a state official to establish qualified immunity at the outset of litigation. Rather, state officials may be required to undergo discovery and multiple adjudications before the immunity defense is resolved.

Even if application of the qualified immunity doctrine to False Claims Act suits were well defined, the mere threat of liability under the statute would likely interfere with the state agencies' ability to implement federal-state programs by deterring qualified professionals from accepting responsibility for administering these programs. Because application of the qualified immunity doctrine is not clearly effective as a protection, it is even more important that this Court clarify that the False Claims Act does not reach state officials sued in their individual capacities.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted and the decision below reversed to the extent it holds that state officials may be sued in their individual capacities.

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IN THE

Supreme Court of the United States

COLLEEN B. WILCOX, *et al.*,
Cross-Petitioners,

v.

UNITED STATES EX REL. JOHN DAVID STONER,
Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, AND SCHOOLS ASSOCIATION FOR EXCESS RISK AS *AMICI CURIAE* IN SUPPORT OF THE CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes a private individual (the relator) to bring a *qui tam* civil action for treble damages and per claim penalties against "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." First enacted in 1863, the FCA's liability provision does not include a definition of the word "person." In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that States and state agencies are not "person[s]" amenable to *qui tam* suits under the FCA. Although the Court expressed "serious doubt" as to whether such suits would even be permitted under the Eleventh Amendment, it did not decide the issue, nor did it decide whether individual state officials are "person[s]" amenable to *qui tam* suits under the FCA. The questions presented are:

1. Whether the Ninth Circuit erred in holding that state officials are "person[s]" amenable to *qui tam* suits under the FCA for actions taken in their official capacities.

2. Whether the Ninth Circuit erred in holding that the Eleventh Amendment does not bar the continued prosecution of an FCA *qui tam* suit brought against state officials after the United States declines to intervene in that suit.

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

This amicus curiae brief is submitted on behalf of the Statewide Association of Community Colleges ("SWACC"), Southern California Regional Liability Excess Fund ("SCR"), Northern California Regional Liability Excess Fund ("NCR"), and Schools Association For Excess Risk ("SAFER").[1] These amici are joint powers authorities ("JPAs"), formed to meet the self-insurance needs of the community colleges and K-12 school districts in the State of California. The JPAs are risk pools where members cooperatively pool contributions of public funds to afford themselves different types of risk protection, including, tort liability coverage. These amici share a commitment to minimize the excess-liability risks that member school districts and community colleges face. This commitment ensures that public funds appropriated for schools and community colleges truly benefit students of the State of California.

SWACC represents a majority of community college districts in California. NCR consists of over 400 K-12 school districts, county offices of education, regional occupational programs, and other public educational entities. SCR represents ninety-two

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[1] Pursuant to Supreme Court Rule 37.3(a), the amici curiae state that the parties have consented to the filing of this brief and have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the amici curiae state that no counsel for a party authored this brief in whole or in part, and no party made a monetary contribution intended to fund the preparation or submission of this brief. Amici curiae further state that no other than SWACC, SCR, NCR, SAFER and their counsel made a monetary contribution to the preparation or submission of this brief.

California public educational agencies. SAFER provides the excess liability coverage to SWACC, NCR, and SCR liability pools, representing approximately 50% of the total average daily attendance of the students in the State of California. For a complete list of respective members of these amici, *see* App. A.

Pursuant to the memorandum of coverage governing each of these amici, the JPAs provide excess liability coverage to a member's officials or employees, while acting for or on behalf of the member. Coverage extends not only to damages compensable to claimants but also to expenses, including costs and fees, incurred in the investigation and defense of claims against such officials or employees.

For the first time in the long history of the FCA, and admittedly in disagreement with other courts, the court of appeal below announced that state employees may be sued in their individual[2] capacities under the FCA for actions taken in the course of their official duties. Under the FCA, a liable defendant is subject to civil penalties as great as $11,000 per claim, as well as treble damages and attorneys' fees. 31 U.S.C. § 3729(a). FCA liability does not require proof of specific intent to defraud, as the term "knowingly" includes a person who, with respect to information, "acts in deliberate ignorance" or "in reckless disregard" of the "truth or falsity of the information." § 3729(b).

The cross-petition implicates the important interest of amici JPAs in protecting the fiscal health of schools and community colleges in the State of California. For almost a century and a half since

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[2] In this brief, "individual" and "personal" are used interchangeably.

Congress adopted the FCA, it has been generally understood that state officials were not subject to FCA liability either in their official or individual capacities for actions taken in the course of their official duties. Until the decision of the court of appeals in this case, state officials have not been targeted by FCA *qui tam* plaintiffs.

Accordingly, the holding below undeniably poses anew huge personal liability risk to state officials. It would dramatically change the FCA landscape since it opens without limit FCA *qui tam* litigation against state officials. In turn, these amici JPAs would have to additionally assess FCA liability risks, for which damages may easily reach millions of dollars, if awarded against state officials whose duties regularly involve administering federally funded programs. In order to guarantee adequate defense and liability protection of state officials from FCA *qui tam* claims, the holding below—if not addressed—would necessarily require a significant increase of publicly funded contributions to group self-insured public education risk pools from their respective members. As States face burgeoning budget deficits, where public education funds are expectedly subject to major cuts, the holding below comes at an inopportune time for schools, community colleges, and their students. Without the Court's intervention, students would be deprived of diminishing public monies the States allocate for their students' educational needs, instead of requiring these funds to be used for defending and funding awards against public school officials.

Based on their collective interests in minimizing the liability risks schools and community colleges face and in ensuring that students receive the

maximum benefit from public funds appropriated for their education, SWACC, NCR, SCR, and SAFER respectfully request that this Court consider the following arguments in support of petitioners' cross-petition for writ of certiorari.

BRIEF OF THE STATEWIDE ASSOCIATION OF COMMUNITY COLLEGES, NORTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, SOUTHERN CALIFORNIA REGIONAL LIABILITY EXCESS FUND, AND SCHOOLS ASSOCIATION FOR EXCESS RISK AS *AMICI CURIAE* IN SUPPORT OF THE CROSS-PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

The Court must grant the cross-petition for writ of certiorari to review the decision below. The holding is inconsistent with the history of the informer *qui tam* mechanism generally and specifically under the FCA. It is also a questionable expansion of the scope of damage suits against state officials in their individual capacities. It supplants congressional policy in dealing with the sovereign States. It raises constitutional challenges, particularly from the Eleventh Amendment.

Notwithstanding the disagreement among federal courts, review is necessary because the decision below permits informer *qui tam* actions against state officials without precedent. The history of the *qui tam* mechanism reveals that the early Colonies inherited the unique tradition from England. At the time, several statutes had authorized private citizens, who suffered no personal injury, to sue others for legal violations and as an incentive receive a portion of the statutory fines. The Federal Gov-

ernment subsequently adopted similar statutory mechanisms authorizing informer *qui tam* actions, but the provisions were intended to enforce penal laws. By the time Congress adopted the FCA in 1863 federal informer *qui tam* statutes were neither intended nor applied to regulate States or their officials. Accordingly, the FCA informer *qui tam* mechanism was originally enacted to stop private defense contractors from defrauding the Federal Government during the Civil War. The FCA has undergone several amendments, but none suggest a broadening of the undefined term "person" to include States or their officials. The legal practice, from the time of the FCA's original adoption in 1863 until even after Congress rekindled the informer *qui tam* mechanism in 1986, confirms this understanding as well. It was only recently that informers began to target the States and—post-*Stevens*—their officials as FCA defendants.

It turns out, however, that the scope of federal suits against state officials in their individual capacities for official actions is historically also very limited. Such suits are permitted only where plaintiffs claim to have actually suffered an individuated injury, in the form of either wrongful taxation or civil rights violation. Thus, the decision below again without precedent broadens the scope of suits against state officials to include actions where the *qui tam* plaintiff was not personally aggrieved.

Furthermore, the Court should grant the cross-petition for writ of certiorari because the decision below supplants congressional policy in dealing with the several States. Rather than permitting private citizens to file suits against States and their officials, Congress has adopted specific and detailed auditing

and internal-control policies within the frameworks of the various federal programs in which States participate. In addition, two years prior to the 1986 amendment of the FCA, Congress specifically addressed state-employee fraud by enacting 18 U.S.C. § 666, which criminalized such conduct. Under the numerous auditing regulations and penal statute, Congress did not authorize a private cause of action.

Lastly, the holding below raises more constitutional questions, specifically from the Eleventh Amendment. Allowing informer *qui tam* actions against state officials poses a very serious danger to the States, a supermajority of which is facing huge budget deficits. In the State of California alone the gap is projected at $24.3 billion for fiscal year 2008-2009. Given the nature of the informer *qui tam* mechanism, where in the past years billions of dollars of *treble* damages have been recovered against private defendants, the fiscal peril to the States is undeniable. To dismiss the Eleventh Amendment challenge, the court of appeal below cites civil rights cases but failed to explain or distinguish *Edelman v. Jordan*, 415 U.S. 651 (1974), which held that States are entitled to invoke their sovereign immunity where the action is *essentially* one for the recovery of money from the States. Moreover, the court of appeal's use of the distinction between official- and personal-capacity suits when applied in the context of informer *qui tam* actions would practically result to grossly unfair consequences, particularly when the state official did not personally benefit. Finally, since the application of the informer *qui tam* mechanism against state officials is not historically supported, the unavailability of official immunity as a defense in order to establish FCA individual-capacity suits

against state officials is doubtful. With this uncertainty and all the other reasons stated in this brief, we urge the Court to grant the cross-petition for writ of certiorari.

REASONS TO GRANT CERTIORARI

I. THE COURT OF APPEAL'S EXPANSION OF "PERSON" UNDER THE FCA IS WITHOUT PRECEDENT

Since the FCA's adoption in 1863 and despite subsequent Congressional amendments the word "person" in the FCA has remained unchanged and undefined. *See Vermont Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765, 783, n. 12 (2000); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003). Thus, to determine the meaning of the word "person" as it is used in what is now § 3729(a) courts are instructed to look for guidance to the FCA's history from its original adoption. *See Stevens*, 529 U.S. at 783, n. 12 (2000); *Chandler*, 538 U.S. at 125; *United States v. McNinch*, 356 U.S. 595, 599 (1958) (finding that the FCA "was not designed to reach every kind of fraud practiced on the Government").

Accordingly, in determining whether States are "persons" under the FCA, the Court found that the FCA was enacted in 1863 to principally stop the massive frauds large private contractors perpetrated during the Civil War. *Stevens*, 538 U.S. at 781. The Court established that the original FCA liability provision bore no indication that States were subject to its penalties. *Ibid.* Further, in light of the presumption against imposition of punitive damages against governmental entities, the punitive nature of FCA damage provisions were found to be inconsistent

with state *qui tam* liability. *Id.* at 784-785. Thus, the Court concluded that States are not "persons" subject to FCA liability. *Stevens*, 529 U.S. at 787. Since the statutory analysis provided a conclusive answer, the Court declined to discuss whether or not an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment. *Ibid.* The Court, however, claimed that "there is a 'serious doubt' on that score." *Stevens*, 529 U.S. at 787, citation omitted.

Guided by *Stevens*, the court of appeal below held that school districts and county offices of education are also not "persons" subject to FCA liability because they are arms of the State for purposes of the Eleventh Amendment. However, expressly claiming to rely only on the plain language of the statute, the court of appeal below held that state officials in their personal capacities for actions taken within the scope of their official duties are "persons" who may be liable under the FCA, even if said officials did not personally benefit. In so holding, the decision below violated the principle enunciated in *Stevens*, ignored the history of the FCA, and expanded without precedent the reach of informer *qui tam* actions, where the Federal Government does not intervene, to include state official liability suits.[3]

The history of *qui tam* actions has been extensively chronicled. *See Stevens*, 529 U.S. at 769, 775-777; Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81 (1972) (hereinafter *History*); Evan

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[3] Throughout this brief, state official liability suits are suits instituted by private citizens for damages against state officials in their personal capacities for actions taken within the scope of their official duties.

Caminker, *The Constitutionality of Qui Tam Actions*, Yale L.J. 341 (1989) (hereinafter *Constitutionality*). Briefly, the *qui tam* action arose in the thirteenth century as a means of allowing plaintiffs to pursue private claims in England's royal courts, which had previously heard only cases involving interests of the Crown. *Stevens*, 529 U.S. at 776. In the fourteenth century, Parliament began adopting statutory mechanisms for bringing *qui tam* actions. *Id.* Parliament's enactments resulted in the development of two kinds of *qui tam* statutes. One type allowed injured parties to seek relief on their own behalf as well as the Crown's. *Id.* at 775. More relevant here is the other type—those that entitled informers to a portion of a wrongdoer's fine, regardless of whether the informer had suffered any personal injury as a result of the statutory violation (informer *qui tam* actions). *Id.* Problems with vexatious and collusive informers later developed, and statutes were passed to either deter and penalize vexatious informers or repeal old statutes. *Id.*; *History*, *supra*, at 89. By the seventeenth century, the two forms of statutory *qui tam* were subject to such different procedural limitations as to make them quite dissimilar. *History*, *supra*, at 90.

The unique English tradition of *qui tam* became part of American law upon the establishment of English Colonies in America. *History*, *supra*, at 93-97. *Qui tam* actions appear to have been similarly prevalent in America at least in the period immediately before and after the framing of the Constitution. *Stevens*, 529 U.S. at 776. Colonies, however, apparently did not allow common-law *qui tam* actions probably because American lawyers in the Colonies were unfamiliar with their use to bring suits in royal as opposed to local courts and because

the popularity of common-law *qui tam* actions had dwindled in England by that time. *Stevens*, 529 U.S. at 776; *History*, *supra*, at 94. Nevertheless, Colonies did pass several informer statutes expressly authorizing *qui tam* actions. *Stevens*, 529 U.S. at 776. Similar to the English experience, Colonies faced abuses by informers. *History*, *supra*, at 97.

The early federal experience with *qui tam* was quite similar to that of the States', except that federal *qui tam* statutes focused more in enforcing penal laws. *History*, *supra*, at 99, n. 105. The First and subsequent early Congresses routinely authorized informer *qui tam* provisions to enforce diverse interests, such as the prohibition of importing liquor without the payment of a duty, of trading slaves with foreign countries, and of trading with Indian tribes in violation of federal regulations. *Stevens*, 529 U.S. at 776-777, fn. 5; *Constitutionality*, *supra*, at 342, n. 3. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich L. Rev. 163, 175 (1992) (hereinafter *Standing*). Most of these early *qui tam* statutes have long been repealed, and of those remaining, most lie essentially dormant. *Constitutionality*, *supra*, at 342, n. 5. By the time of the enactment of the FCA in 1863, it seems clear that federal informer *qui tam* statutes were neither intended nor applied to regulate States or their officials in their official dealings with the Federal Government. *Stevens*, 529 U.S. at 776-777, fn. 5; *Constitutionality*, *supra*, at 342, n. 3, *Standing*, *supra*, at 175.

Thus, although the liability provision of the original FCA has undergone various changes, none suggest a broadening of the term "person" to include

States[4] or, pertinent here, their officials. *See Stevens*, 529 U.S. at 782; Thomas A. Colthurst & Shelley R. Slade, *Healthcare-Care Fraud and the False Claims Act: The Supreme Court Supports a Federal Weapon*, 10 Bus. L. Today, Sept./Oct. 2000, at 24, 26 (stating that the FCA was sparingly used prior to the late 1980s); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 541-542, n. 8 (indicating that pre-1986 statutes generated relatively little FCA litigation) (hereinafter *Eradication*). In fact, even after Congress amended the FCA in 1986 to re-invigorate its use, informers (or even perhaps the federal attorneys general) still did not initially file FCA cases against the States or their officials. *See* Janet Goldstein & John Phillips, *The False Claims Act in Practice, in Qui Tam: Beyond Government Contracts* 469, 480 (John T. Boese ed., 1993) (stating that, from 1986 through 1993, approximately seventy-five percent of FCA *qui tam* cases had been filed against defense contractors). Eventually by the early 1990s, informers sought to use the FCA against the States. *See* Kary Klismet, Note, *Quo Vadis, "Qui Tam"? The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 87 Iowa L. Rev. (2001) 283, 292-293, n. 57. However, the Court put to rest such FCA *qui tam* suits since, as previously explained, States were held not to be "persons" liable under the FCA. *Stevens*, 529 U.S. at 787.

Informers, as here, despite the long history of federal informer *qui tam* statutes and of the FCA, now attempt to overcome *Stevens* and ultimately

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[4] Hereinafter "States" also include arms of the State.

reach the States by targeting their officials. *See e.g., United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001), *cert. denied sub nom. United States ex rel. Gaudineer & Comito, L.L.P. v. Gesaman*, 536 U.S. 925 (2002); *United States ex. rel. McVey v. Board of Regents of Univ. of Cal.*, 165 F. Supp. 2d 1052 (N.D. Cal. 2001); *United States ex rel. Burlbaw v. Regents of N.M. State Univ.*, 324 F. Supp.2d 1209 (D.N.M. 2004), *appeal pending sub nom. United States ex rel. Burlbaw v. Orenduff*, No. 06-2006 (10th Cir. Argued Mar. 5, 2007). This recent and novel development of suing state officials for FCA liability appears to digress from historical legal practice of federal informer *qui tam* actions, yet the court of appeal below stamped its approval by claiming that such suits are permissible against state officials in their individual capacities. The court of appeal below claimed to draw support from case law involving state official liability suits, primarily *Hafer v. Melo*, 502 U.S. 21 (1991).

Hafer, 502 U.S. 21, addressed whether or not state officials may be sued in their individual capacities under 42 U.S.C. § 1983 (hereinafter section 1983). It turns out that for more than a century and a quarter state official liability suits have found its most widespread use in civil rights actions under section 1983. *See generally Hafer*, 502 U.S. 21; *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961); *Myers v. Anderson*, 238 U.S. 368 (1915). In contrast to the FCA, however, section 1983 was expressly directed to the States. *See* App. B. *Monroe*, 365 U.S. at 183. Moreover, section 1983 cases reveal that in those

cases plaintiffs' claims arise from deprivations of individual plaintiffs' "constitutional rights, privileges and immunities by an official's abuse of his position." *Hafer*, 502 U.S. at 27 (quoting *Monroe*, 365 U.S. at 172).

Historically, in addition to section 1983 cases, state official liability suits have also been permitted in cases involving unconstitutional taxation. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 858 (1824). In *Osborn v. Bank of the United States*, the Court ruled that the Eleventh Amendment did not bar a suit against Ohio state officials for recovery of money taken from the plaintiff bank under an unconstitutional tax provision. *Id.* at 741-744, 858. Later in 1912, the Court similarly held that a plaintiff corporation may recover back from the Secretary of State of Colorado taxes it paid under protest since the state tax imposed an unconstitutional burden on interstate commerce. *Atchison, Topeka & Sante Fe Railway Co. v. O'Connor*, 223 U.S. 280, 286 (1912); *cf. Matthews v. Rodgers*, 284 U.S. 521, 528 (1932).

Review of cases dealing with state official liability suits demonstrates that such suits are limited to actions where plaintiffs actually suffered an individuated injury in the form of either wrongful taxation or civil rights violation. Obviously, individuated injury is what informer *qui tam* actions lack. *See Stevens*, 529 U.S. at 773 ("A *qui tam* relator has suffered no such invasion—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails."); *History*, *supra*, at 85 ("In comparison with the aggrieved party, an informer was motivated by the chance of gain, not by the need for recovery.");

Constitutionality, *supra*, at 345 ("The *qui tam* litigant is not personally injured by the defendant's challenged conduct; her interest in the litigation arises rather from the statutory bounty offered for successful prosecution."). Thus with the decision below, the court of appeal independently authorized informer *qui tam* actions as a mechanism to commence state official liability suits. This contrived result does not follow the histories of the FCA, of federal informer *qui tam* actions, and of state official liability suits.

II. THE DECISION BELOW OVERRIDES CONGRESSIONAL POLICY

Not only does the decision below ignore the history of the FCA, but it also supplants congressional policy in dealing with the several States. In adopting the FCA, Congress recognized that detecting fraud against the federal treasury often is extremely difficult for the Federal Government without the aid of informers. *See* S. Rep. No. 345, at 4, reprinted in 1986 U.S.C.C.A.N. 5266 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.").

In dealing with States, however, Congress has not expressed the need to utilize informers to detect fraud. Rather, to ensure state compliance and to deter state-official fraud, Congress has adopted specific and detailed auditing and internal-control policies within the frameworks of the various federal programs in which States participate. *See* App. C. In these federal funding schemes, Congress has particularly selected various members of the Executive Branch, such as inspectors general of involved de-

partments, to conduct or supervise audits on the States or their agencies. Therefore, it appears that Congress has decided to assign the duty to detect state-official fraud of federal funds to particular federal officials and not to *qui tam* informers.

Moreover, two years prior to the 1986 revitalization of the FCA, Congress amended Title 18 of the United States Code to add section 666, which specifically criminalizes fraud committed by an "agent" of the State or local government. *See* 18 U.S.C. § 666 (added Oct. 12, 1984, Pub. L. No. 98-473, Title II, Ch. XI, Part C, § 1104(a), 98 Stat. 2143. In its original form, state officials who violated section 666 were punishable for a maximum imprisonment of ten years and a fine not more than $100,000 or an amount equal to twice that which was obtained in violation of the section, or whichever was greater. Pub. L. No. 98-473, Title II, Ch. XI, Part C, § 1104(a), 98 Stat. 2143. In 1986, the same year that Congress amended the FCA, Congress reorganized section 666 and removed the penalty provisions to coincide with federal sentencing guidelines. Act of Nov. 10, 1986, Pub. L. No. 99-646, § 59(a), 100 Stat. 3612. Courts generally understand that section 666 does not create a private cause of action. *See Piokowski v. Parziale*, 2003 U.S. Dist. LEXIS 7624 at *27 (D. Conn. 2003); *Whitmire v. United States Veterans Admin.*, 661 F.Supp. 720 (W.D. Wash. 1986).

Considering the special relationship the Federal Government has with the States, Congress has enacted numerous regulations and statutes that specifically address state-official fraud; none of which incorporate informer *qui tam* mechanisms. In connection with the history of the FCA, the court of appeal, by authorizing informer *qui tam* actions

against state officials, appears to have legislated new means of overseeing appropriations of federal funds to the States.

III. THE DECISION BELOW THREATENS STATE SOVEREIGNTY

Finally, the decision below appears to violate the doctrine that courts must interpret statutes so as to avoid difficult constitutional questions. *See Stevens*, 529 U.S. at 787. Holding that state officials in their personal capacities for actions taken within the scope of their official duties are "persons" under the FCA faces a significant hurdle brought by the Eleventh Amendment.[5]

Permitting informers *qui tam* to pursue FCA actions against state officials even in their individual capacities presents a very serious danger to the States. More than half of the States, including some of the Nation's largest, are facing an estimated $40 billion in combined shortfalls in their fiscal year 2009 budgets. Elizabeth C. McNichol & Iris J. Lav, *25 States Face Total Budget Shortfall of at Least $40 Billion in 2009; 6 Others Expect Budget Problems*, Center on Budget and Policy Priorities, *at* http://www.cbpp.org/1-15-08sfp.pdf (last modified April 29, 2008), at 2. On average, the shortfall is 8.6% of the States' general fund budgets. *Id.* Some of the States' budget gaps are expected to last for several fiscal years. *Id.* Similar to how States have in the past

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[5] In addition, the Due Process Clause of the Fourteenth Amendment, the Appointments Clause of section 2 and the "take care" Clause of section 3 of the United States Constitution similarly raise difficult constitutional questions arising from the holding below.

addressed fiscal problems, States would be expected to cut services like health and education. *Id.* at 3.

With respect to the State of California, it projects a revised state budget gap of $24.3 billion for fiscal year 2008-2009. *See* Governor's Budget May Revision 2008-2009 *at* 1, *at* http://www.ebudget.ca.gov/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf (last visited May 15, 2008). Due to the State's deepening fiscal difficulties, Medi-Cal expenditures would be cut by $353.2 million. *Id.* at 35. The budget allocation for the State's Department of Corrections and Rehabilitation would be decreased by $115.2 million. *Id.* at 55. The workload budget reduction for the University of California would be $233.4 million. *Id.* at 75. For the California State University, it would be $215.3 million. *Id.* at 76. The expected budget cut for administered child care programs totals $198.9 million. *Id.* at 68. Overall, the budget reductions in education would affect students. *See* Jack O'Connell, *Schools Chief Jack O'Connell Responds to Governor's May Budget Revision*, California Department of Education News Release #08-61, May 14, 2008, *available at* http://www.cde.ca.gov/nr/ne/yr08/yr08rel61.asp (last visited May 15, 2008). "Many teachers and other essential school staff will still face layoffs, classroom sizes are likely to increase, and there is no cost-of-living increase at a time when the cost of gas, food, and other school essentials is increasing." *Id.*

Given the nature of the informer *qui tam* mechanism and attendant expenses associated with it, the fiscal peril to the States would be exponential. As of September 1999, 2959 *qui tam* actions had been filed since 1986, and more than 50% of those cases had been filed only since the beginning of fiscal year

1997. *Eradication*, *supra*, at 542, n. 11. *Qui tam* settlements and judgments totaled well over $9 billion from the enactment of the 1986 amendments through 2005. *See* Sharon Finnegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 Penn St. L. Rev. 625, 643-644, n. 155, 156 (2007) (hereinafter *Integrity*). Over the same period, *qui tam* plaintiffs recovered over $1.5 billion in cases where the government intervened, and over $99 million in cases in which the government did not intervene. *See ibid.* Since 2000, the Federal Government has recovered well over one billion dollars in all but one year. *See* Michael Murray, *Seeking More Scienter: The Effect of False Claims Act Interpretations*, 117 Yale L.J. 981 (2008). The grave concern is that these numbers most likely did not even consider the States or their officials. *See Eradication*, *supra*, at 542, n. 11 (explaining that the principal targets of *qui tam* litigation thus far have been the defense industry and health care providers); *Integrity*, *supra*, at 651 (stating that of the $4 billion awarded in FCA *qui tam* actions as of 2001, $2.3 billion was recovered from suits involving the health care industry).

In addition to the damages that could be awarded against state officials, States would also incur other significant burdens resulting from the decision below. Since to hold a person liable for FCA does not require specific intent to defraud, *see* 31 U.S.C. § 3729(b), an overwhelming majority of the States would be confronted with and have to dedicate additional public funds for litigation costs in defense of their state officials. *See* App. D. States might also have to expend funds for preventative measures to reduce the likelihood of a *qui tam* suit. *See* William C. Kovacic,

Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting, 29 Loy. L.A.. L. Rev. 1799, 1827 (1996). Officials might have to resort to internal consensus to avoid sole responsibility for dealings with the Federal Government. *Id.* This would necessitate more bureaucracy and more time but result in less efficiency. *Id.* Conversely, the informer *qui tam* mechanism might turn state employees into opportunistic bounty hunters. *See id* at 1833, 1841.

The court of appeal dismissed the Eleventh Amendment challenge by concluding that the damages would come from the individual defendants and not the state treasury. The court of appeal further indicated that the fact that States may choose to indemnify the employee for judgment rendered against their officials does not bring the Eleventh Amendment into play. In this regard, similar to its statutory construction of "person" under the FCA, the court of appeal attempted to overcome the Eleventh Amendment challenge with a somewhat unconventional explanation. This time it borrowed section 1983 case law and the mechanism of individual-capacity actions. The rationale nonetheless is inconsistent with Eleventh Amendment jurisprudence.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. Const. amend. XI. In *Edelman v. Jordan*, 415 U.S. 651 (1974), plaintiff filed a complaint in a federal district court, individually and as a class representative, seeking declaratory and injunctive relief against former state officials. These officials had allegedly administered

the federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. *Id.* at 653. AABD was one of the State's categorical aid programs funded by the State and the Federal Governments. *Id.* Plaintiff specifically requested "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld." *Id.* at 656. Ultimately, the district court ordered the state officials to "release and remit AABD benefits wrongfully withheld to all applicants. . . ." *Id.* The court of appeal affirmed and, partly due to a conflict with another court of appeal, the Court granted certiorari. *Id.* at 658.

The Court explained that the Eleventh Amendment bars suits not only against the State when it is the named party but also when it is the party in fact. *Edelman,* 415 U.S. at 651. "While the Amendment by its terms does not bar suits against a State by its own citizens, [the] Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. [citations omitted]." *Id.* at 662-663. "'When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit *even though individual officials are nominal defendants.*'" *Ibid.* (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459 (1945) (italics added). Thus the rule has evolved that a suit by private plaintiffs to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Edelman*, 415 U.S. at 663. *See also Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944).

In light of these principles, the Court found that the funds to satisfy the award sought by plaintiff would inevitably come from the general revenues of the State and so would resemble more closely a monetary award against the State itself. *Edelman*, 415 U.S. at 665. The Court also stated that the award in many aspects would be of damages against the State, which to a virtual certainty, would be paid from state funds. *Id.* The Court therefore reversed the district court's order of retroactive payment of benefits found to have been wrongfully withheld. *Id.*

Amici believe that *Edelman*, rather than section 1983 cases, applies in this case. Particularly where fraudulent intent and personal benefit from an alleged false claim are not required to prove FCA liability, an informer *qui tam* FCA action is essentially one for the recovery of money from the State and not the individual defendant. FCA liability against state officials practically would be indemnified by the employer State, thus an award funded by, recovered from, and against the State, times three. The court of appeal below, however, without distinguishing or explaining *Edelman*, seemed to have eased into the conclusion that the FCA *qui tam* action was not against the State.

Furthermore, the limitation of suits against officials in their individual capacities seems unhelpful in this case. Should the state official die pending final resolution of a personal-capacity action, the plaintiff could pursue his action against the decedent's estate. *Kentucky*, 437 U.S. at 167, fn. 11. It would seem illogical and grossly unjust to permit an informer *qui tam* to sue a former official's decedents to recover an award of FCA damages, particularly when allegedly misappropriated funds

could not be traced to the former official's personal assets.

Lastly, the Court has indicated that damages are available against state officials sued in their personal capacities only after the rule is well-established. State officials sued in their personal capacities for committing constitutional torts should be liable for damages only to the extent that the law has become clear and well-known and to the extent that official immunity is therefore not available as a defense. *See Wilson v. Layne*, 526 U.S. 603, 614-615 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, the Court's announcement in *Hafer* that state officials under section 1983 may be sued in their personal capacities for actions taken within the scope of their official duties was nothing new. It was simply a clarification of a previous (and perhaps vague) holding in *Will*, 491 U.S. 58. *Hafer*, 502 U.S. at 22. *See* Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859, 875-876 (2000). Undeniably, the section 1983 rule regarding state official liability was fairly well-established by the time of *Hafer*. *See generally, Kentucky*, 473 U.S. 159; *Wood*, 420 U.S. 308; *Scheuer*, 416 U.S. 232; *Moor*, 411 U.S. 693; *Monroe*, 365 U.S. 167; *Myers*, 238 U.S. 368. In sharp contrast, both the history of and the legal practice under the FCA do not support extending its reach to FCA liability against state officials even in their individual capacities for actions taken within the scope of their official duties.

CONCLUSION

For the reasons stated above, and those stated in the cross-petition, these amici urge the Court to grant certiorari and summarily reverse the decision below.

Respectfully submitted,

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May 22, 2008

APPENDIX A

Statewide Association Of Community Colleges

Bay Area Community College Districts JPA
Allan Hancock Joint Community College District
Contra Costa Community College District
Gavilan Joint Community College District
Hartnell Community College District
Monterey Peninsula Community College District
Ohlone Community College District
San Jose/Evergreen Community College District
San Luis Obispo County Community College District
South Bay Regional Public Safety Consortium
West Valley-Mission Community College District
Northern California Community Colleges JPA
Butte-Glenn Community College District
College Of Marin
Feather River Community College District
Lassen Community College District
Mendocino-Lake Community College District
Napa Valley College District
Redwoods Community College District
Siskiyou Joint Community College District
Solano County Community College District
Yuba Community College District
Cabrillo Community College District
Cerritos Community College District
Chabot-Las Positas Community College District
Citrus Community College District
Coast Community College District
Compton Community College District
Desert Community College District
El Camino College Compton District
Lake Tahoe Community College District
Long Beach Community College District
Mt. San Jacinto Community College District

Palomar Community College District
Pasadena Community College District
San Bernardino Community College District
San Francisco Community College District
Santa Clarita Community College District
Santa Monica Community College District
Shasta-Tehama-Trinity Joint Community College District
Santa Rosa County Junior College District
South Orange County Community College District
Southwestern Community College District
Ventura County Community College District
Victor Valley Community College District
West Kern Community College District

Northern California Regional Liability Excess Fund

Central Valley Schools JPA
Hilmar Union Elementary School District
Livingston Union Elementary School District
Winters Joint Unified School District
Yolo County Office of Education
Contra Costa/Solano Counties Sd & Sia Jpa
Benicia Unified School District
Brentwood Union Elementary
Byron Union Elementary
Canyon Elementary
Knightsen Elementary
Lafayette Elementary
Liberty Union High School District
Martinez Unified School District
Moraga Elementary
Oakley School District
Pittsburg Unified
East Bay Schools Insurance Group (EBSIG)
Acalanes Union High School District

Alameda City Unified School District
Alameda Community Learning Center Charter School
Antioch Unified School District
Castro Valley Unified School District
Contra Costa SELPA
Eden Area ROP
John Swett Unified School District
Mid Alameda SELPA
Mission Valley ROP
Mountain House Elementary School District
Orinda Union School District
Pleasanton Unified School District
San Leandro Unified School District
Sunol Glen School District
Tri Valley Regional Occupational Program
Walnut Creek School District
Marin Schools Insurance Authority (Marin SIA)
Bolinas-Stinson Union School District
Dixie School District
Kentfield School District
Laguna Joint School District
Lagunitas School District
Larkspur School District
Lincoln School District
Marin County Superintendent of Schools
Phoenix Academy
Marin Pupil Transportation Agency
Mill Valley School District
Nicasio School District
Reed Union School District
Ross School District
Ross Valley School District
San Rafael City High School District
San Rafael City School District
Sausalito/Marin City School District

Willow Creek Academy Charter School
Tamalpais Union High School District
Union Joint School District
Monterey/San Benito County Property & Liability JPA
Alisal Union School District
Aromas-San Juan Unified School District
Bradley Union School District
Carmel Unified School District
Chualar Union School District
Gonzales Unified School District
Graves School District
Greenfield Union School District
Hollister School District
Jefferson School District
King City Joint Union High School District
King City Union School District
Lagunita School District
Mission Union School District
Monterey County Office of Education
Monterey County Schools WC JPA Program
Monterey County SIG Benefits JPA Program
North County Joint Union School District
North Monterey County Unified School District
Pacific Grove Unified School District
Pacific Unified School District
Salinas City School District
Salinas Union High School District
San Antonio Union School District
San Ardo Union School District
San Benito County Schools Medical IP
San Benito High School District
San Lucas Union School District
Santa Rita Union School District
Soledad Union School District
Spreckels Union School District

Washington Union School District
North Coast Schools Insurance Group
Arcata School District and
Coastal Grove Charter School
Big Lagoon Union School District
Big Lagoon Charter Network
Blue Lake Union School District
Bridgeville School District
Cuddeback Union School District
Cutten School District
Del Norte County Office of Education
Del Norte Unified School District
Castle Rock Home Charter School
Eureka City Schools
Ferndale Unified School District
Fieldbrook School District
Fortuna Union High School District
Fortuna Union School District
Freshwater School District
Freshwater Charter Middle School
Garfield School District
Green Point School District
Humboldt County Office of Education
Hydesville School District
Jacoby Creek School Charter District
Klamath-Trinity Joint Unified School District
Kneeland School District
Loleta Union School District
Maple Creek School District
Mattole Unified School District
McKinleyville Union School District
Northern Humboldt Union High School District
Six Rivers Charter High School
Orick School District
Pacific Union School District
Peninsula Union School District

Rio Dell School District
Rohnerville School District
Scotia Union School District
South Bay Union School District
Southern Humboldt Joint Unified District
Trinidad Union School District
Northern California Schools Insurance Group (NCSIG)
Acorns to Oaks Charter School
Anderson Union High School Dist
Anderson New Technology High School
Antelope Elementary
Arena Union Elementary
Bangor Union Elementary
Bella Vista Elementary
Bend Elementary
Big Springs Union Elementary
Big Valley Unified
Black Butte Elementary
Bogus Elementary
Burnt Ranch Elementary
Butte Valley Unified
Butteville Union Elementary
Cascade Union Elementary
Castle Rock Union Elementary
Charter Academy of the Redwoods
Chico Unified
Chrysalis Charter School
Coffee Creek Elementary
Columbia Elementary
Corning Union Elementary
Corning Union High School District
Cottonwood Union Elementary
Cox Bar Elementary
Delphic Elementary
Douglas City Elementary

Dunsmuir Elementary
Dunsmuir Jt. Union High School District
Eel River Charter School
Elkins Elementary
Enterprise Elementary
Etna Union Elementary
Etna Union High School District
Evergreen Union Elementary
Fall River Jt. Unified
Flournoy Elementary
Forks of Salmon Elementary
Fort Bragg Unified
Fort Jones Union Elementary
Fort Sage Unified
French Gulch Whiskeytown Elementary
Gateway Unified (Unified 7/1/92)
Gazelle Union Elementary
Gerber Union Elementary
Grant Elementary
Grenada Elementary
Happy Camp Union Elementary
Happy Valley Elementary
Hornbrook Elementary
Igo Ono Platina Elementary
Indian Springs Elementary
Janesville Elementary
Johnstonville Elementary
Junction City Elementary
Junction Elementary
Junction Elementary
Kirkwood Elementary
Klamath River Union Elementary
La Vida Independent Study Charter School
Lassen COE & ROP
Diamond Mountain Charter High School
Lassen Union High School District

Lassen View Union Elementary
Laytonville Unified
Leggett Valley Unified (Unified 7/1/90)
Lewiston Elementary
Little Shasta Elementary
Live Oak Unified
Los Molinos Unified
Manchester Union Elementary
Manton Jt. Union Elementary
McCloud Union Elementary
Mendocino COE
Mendocino Unified
Millville Elementary
eScholar Academy
Mineral Elementary
Modoc County Office of Education
Modoc Jt. Unified
Monarch Learning Center - Charter School
Montague Elementary
Mountain Union Elementary
Mountain Valley Unified
Mt. Shasta Union Elementary
North Cow Creek Elementary
North Woods Discovery School
Northeastern JPA for Workers Comp (liab only)
Oak Run Elementary
Pacheco Union Elementary
Plum Valley Elementary
Plumas County Office & ROP
Plumas Unified
Pope Valley Union Elementary
Pt. Arena Jt. Union High School Dist
Quartz Valley Elementary
Ravendale-Termo Elementary
Red Bluff Union Elementary
Red Bluff Union High School District

Redding Elementary
Shasta Secondary Home School
Shasta Trades Academy
Reeds Creek Elementary
Richfield Elementary
Richmond Elementary
Rocky Point Charter School
Round Valley Unified
Scott Valley Unified (Unif 7/1/07)
Etna Academy of Arts, Science & Technology
Seiad Elementary
Shaffer Union Elementary
Shasta COE
Stellar Charter School of Technology & Home Study
Shasta Trinity Regional Occupation Program
Shasta Trinity Schools Insurance Group
Shasta Union Elementary
Shasta Union High School District
Stellar Secondary Charter High School
Siskiyou COE
Siskiyou ROP JPA
Siskiyou Union High School District
Southern Trinity Jt. Unified
Surprise Valley Jt. Unified
Susanville Elementary
Tehama COE
Tree of Life School -Charter School (The Beginning Project, A CA Public Benefit Corp)
Trinity Center Elementary
Trinity COE
Trinity Union High School District
Tulelake Basin Jt. Unified
Ukiah Unified
University Preparatory Charter School
Weaverville Elementary
Weed Union Elementary

Westwood Unified
Whitmore Elementary
Willits Charter School
Willits Unified
Willow Creek Elementary
Yreka Union Elementary
Yreka Union High School District
Organization Of Self Insured Schools (OSS)
Alvina Elementary Charter School District
American Union School District
Armona Union Elementary School District
Crossroads Charter School
Central Unified School District
Central Valley Preschool
Clay Elementary School District
Delta View Districtwide Comm. Charter
Dinuba Unified School District
Firebaugh-Las Deltas Unified School District
Fowler Unified School District
Fresno County Office of Education
Fresno County Self Insurance Group (FCSIG)
Golden Plains School District
Island Union Elementary SD Community Charter
Kerman Unified School District
Kings Canyon Unified School District
Kings River-Hardwick Union Elem School Districtwide CS
Kingsburg Joint Union Elementary Charter School District
Kingsburg Joint Union High School District
Kit Carson Elementary School District
Mid-Valley Alternative Charter School
Lakeside Union Elementary School District
Laton Unified School District
Los Banos Unified School District
Mendota Unified School District

Monroe Elementary School District
Orange Center School District
Pacific Union School District
Parlier Unified School District
Raisin City Elementary School District
Riverdale Joint Unified School District
Sanger Unified School District
Sanger Hallmark Charter School
Sanger Academy Charter School
Quail Lake Environmental Charter School
Selma Unified School District
South County Support Services Agency
Southwest Transportation Agency
Valley Regional Occupational Program
Washington Colony School District
Washington Union High School District
West Park School District and
West Park Charter Academy
Blue Mountain, Allensworth and Santa Ana
Westside Elementary School District
San Joaquin Co. Schools Property & Liability
Insurance Group
Banta School District
Escalon Unified School District
Jefferson School District
Lammersville School District and
Lammersville Charter School
Lincoln Unified School District
Linden Unified School District
New Hope School District
New Jerusalem School District
New Jerusalem Charter School
Delta Charter High School
Oakview Union School District
Ripon Unified School District
San Joaquin County Data Processing JPA

San Joaquin County Office of Education
Venture Academy (Previously One Charter)
San Joaquin County Work Comp IG
Santa Clara County Schools' Insurance Group
Cambrian School District
Sartorette Charter School
Ida Price Charter Middle School
Farnham Charter School
Fammatre Charter School
East Valley Transportation
Franklin-McKinley School District
Gilroy Unified School District
Institute of Computer Technology
Loma Prieta Joint Union School District
Los Gatos-Saratoga Community Education and Recreation
Los Gatos Union School District
Luther Burbank School District
Moreland School District
Morgan Hill Unified School District
Mount Pleasant School District
Oak Grove School District
Orchard School District
Santa Clara County SIG JPA Office
Saratoga Union School District
Silicon Valley Joint Powers Transportation Agency
South East Consortium for Special Education
Sunnyvale School District
Union School District
West Valley Schools Transportation JPA
Signal
Anderson Valley Unified School District
Lakeport Unified School District
Lake County Office of Education
Lucerne School District
Middletown Unified School District

Potter Valley Community Unified
Upper Lake Union High School District
Upper Lake Union School District
Southern Peninsula Regional Insurance Group (SPRIG)
Bitterwater-Tully Union School District
Bonny Doon Union School District
Cienega Union School District
Happy Valley School District
Live Oak School District
Cypress Charter School
Tierra Pacifica Charter School
Mountain School District
North Santa Cruz County SELPA
Pacific Elementary School District
Panoche School District
San Benito County Office of Education
San Lorenzo Valley Unified School District
San Lorenzo Valley USD Charter School
Santa Cruz/San Benito County SIG
Santa Cruz City Schools
Delta Charter School
Santa Cruz County Health IG Benefits Program
Santa Cruz County Office of Education
Pacific Collegiate Charter School
Scotts Valley Unified School District
Soquel Union School District
Southside School District
Tres Pinos Union School District
Willow Grove Union School District
Tulare County Schools Self Insurance Authority
Alpaugh Unified School District
Alta Vista School District
Burton Elementary School District
Burton ESD—Summit Charter School
College of the Sequoias

Columbine School District
Cutler-Orosi Unified School District
Earlimart School District
Farmersville School District
Kings River Union School District
Pixley Union School District
Richgrove School District
School Employees Trust-Tulare County JPA
Stone Corral School District
Terra Bella Union School District
Three Rivers Union School District
Traver Joint School District
Tulare County Office of Education
La Sierra Charter High School
Eleanor Roosevelt Community Learning Center
Tulare County SIG
Visalia Unified School District
Visalia USD Charter Home School Academy
Visalia USD Charter Alternatives Academy Charter School
Visalia Charter Independent Study
Contra Costa County Office Of Educatio
Cupertino Union School District
East Side Union High School District
Fremont Unified School District
The Circle of Independent Learning Charter School
Fremont Union High School District
Grant Joint Union High School District
Grant Community Outreach Academy
Community Collaborative Charter
Futures Academy
Higher Learning Academy
California Aerospace Academy
Phoenix Rising Charter Academy
Sacramento Academic & Vocational Academy
Livermore Valley Unified School District

Lodi Unified School District
Joe Serna Jr. Charter School
Manteca Unified School District
Marysville Joint Unified School District
Marysville Charter Academy Of The Arts
Monterey Peninsula Unified School District
Newark Unified School District
Novato Unified School District
Novato Charter School
Oakland Alameda ROP
Pajaro Valley Unified School District
Pacific Coast Charter School
Alianza Charter School
Linscott Charter School
Academic/Vocational Charter Institute
Watsonville Charter School of the Arts
Palo Alto Unified School District
San Lorenzo Unified School District
San Ramon Valley Unified School District
Stockton Unified School District
James L. Urbani Institute for Lang Dept
Institute of Business, Management and Law
Tracy Joint Unified School District
Turlock Unified School District
Washington Unified School District
West Sacramento Early College Preparatory
West Contra Costa Unified School District

Southern California Regional Liability Excess Fund

Northern Orange County L&P SIA (NOC L/P SIA)
ABC Unified School District
Anaheim City School District
Buena Park School District
Capistrano-Laguna Beach ROP
Centralia School District

Coastline Regional Occupational Program
Cypress School District
GASELPA
La Habra City School District
Los Alamitos Unified School District
Magnolia School District
North Orange County Regional Occupational Program
North Orange County Self-Funded Workers' Compensation Program
Orange County Fringe Benefits Program
Savanna School District
Westminster School District
Riverside Schools Insurance Authority (RSIA)
Banning Unified School District
Beaumont Unified School District
Coachella Valley Unified School District
Desert Center Unified School District
Desert Sands Unified School District and Washington Charter School
Menifee School District
Murrieta School District Educational Facilities Corporation
Murrieta Valley Unified School District
Nuview Union School District
Nuview Bridge Academy
Palo Verde Community College District
Palo Verde Unified School District
Perris School District
Perris Union High School District
Choice 2000 Online School
California Military Institute
Riverside Employer Employee Partnership JPA
Riverside County Superintendent of Schools
Riverside Schools Risk Management Authority
Romoland School District

San Jacinto Unified School District
Temecula Valley Unified School District
Temecula Valley Charter School
Temecula Prep Charter School
Val Verde Unified School District
Self Insurance Risk Management Authority Ii (SIRMA II)
Acton-Agua Dulce Unified School District
Antelope Valley Community College District
Antelope Valley Schools' Transportation Agency
Castaic Union School District
Eastside Union School District
Gorman School District
Gorman Charter School
Guidance Charter School
Hughes-Elizabeth Lakes Union School District
Keppel Union School District
Lancaster School District
Palmdale School District
Santa Clarita Valley Food Services Agency
Saugus Union School District
Self Insurance Risk Management Authority Self-Funded Workers' Compensation Program
Self Insurance Risk Management Authority III – Employee Benefits
Sulphur Springs Union School District
Whittier Area L/P SIA (WALSPIA)
East Whittier City School District
Los Nietos School District
Pupil Transportation Cooperative
South Whittier School District
Tri-Cities Regional Occupational Program
Alvord Unified School District
Calexico Unified School District
El Rancho Unified School District
Fontana Unified School District

Fountain Valley Unified School District
Garden Grove Unified School District
Hacienda-La Puente Unified School District
Irvine Unified School District
Jurupa Unified School District
Oceanside Unified School District
Orange Unified School District
El Rancho Charter School
Palm Springs Unified School District
Poway Unified School District
Redlands Unified School District
Rialto Unified School District
Santa Barbara Elementary/High School District
Santa Barbara Charter School
Peabody Charter School
Cesar Estrada Chavez Dual Language CS
Snowline Joint Unified School District
Victor Valley Union High School District
Vista Unified School District
William S. Hart Union High School District

APPENDIX B

Section 1 in the bill as originally introduced in 1871 read as follows:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication," and the remedial laws of the United States which are in their nature applicable in such cases.

Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. Presently, section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX C

Code of Federal Regulation	Federal Program Affected
7 C.F.R. § 210.8	school lunch
7 C.F.R. § 215.13	milk for children
7 C.F.R. § 220.15	school breakfast
7 C.F.R. § 225.10	summer food service
7 C.F.R. §§ 226.8, 235.5, 240.11	child and adult care food
7 C.F.R. §§ 246.20, 246.23, 248.20	supplemental food for women, infants, and children
7 C.F.R. § 249.20	senior farmers' market nutrition
7 C.F.R. § 277.17	food stamp and food distribution
7 C.F.R. § 1290.10	specialty crop block grants
7 C.F.R. § 1948.96	energy-impacted area development assistance
7 C.F.R. § 3015 App. B	uniform federal assistance regulations
12 C.F.R. 1805.804	community development financial institutions
20 C.F.R. § 658.603	job service system
20 C.F.R. § 667.400	employment and training administration
21 C.F.R. § 1403, App. A	drug control policy
23 C.F.R. § 172.7	highways
23 C.F.R. §§ 1200.35, 1250.4, 1251.4	highway traffic safety

24 C.F.R. §§ 92.201, 92.550	home investment partnership
24 C.F.R. § 511.71	rental rehabilitation grants
24 C.F.R. §§ 570.490, 470.493	state community development block grants
31 C.F.R. § 205.9	federal assistance program included in Treasury-State agreements
34 C.F.R. § 76.783	education grants
34 C.F.R. § 303.123	early intervention for infants and toddlers with disabilities
34 C.F.R. § 370.48	special education
40 C.F.R. Part 31, App, A	environmental protection
40 C.F.R. § 35.3570	drinking water
40 C.F.R. § 52.2270	air
44 C.F.R. Part 14, App. A	emergency management
45 C.F.R. § 262.3	public welfare)
49 C.F.R. § 266.23	assistance for local rail service
49 C.F.R. § 350.313	commercial motor carrier safety assistance

APPENDIX D

At least two-thirds of the States generally require that the States themselves, directly or through self-insurance funds, bear the costs of both defense and indemnification of their officials against claims resulting from actions within the officials' scope of employment. These States and the statutory indemnification provisions are:

Alaska	Alaska Stat. §14.12.115 (Michie 2007).
California	Cal. Gov. Code § 825(a) (Deering 2007).
Colorado	Colo. Rev. Stat. § 24-10-110 (2007).
Connecticut	Conn. Gen. Stat. § 5-141d (2008).
Delaware	Del. Code Ann. tit. 10, § 4002 (2008).
Idaho	Idaho Code § 6-903(b)(i) (Michie 2007).
Illinois	5 Ill. Comp. Stat. 350/2, subd. (a) & (e) (2008).
Kentucky	Ky. Rev. Stat. Ann. § 65-2005 (Michie 2008).
Louisiana	La. Rev. Stat. Ann. § 13:5108.1 (West 2008).
Maine	Me. Rev. Stat. Ann. tit. 14, § 8112 (West 2007).
Maryland	Md. Code Ann. Cts. & Jud. Proc. § 5-302 (2008).
Massachusetts	Mass. Gen. Laws ch. 12, §§ 3, 3E, ch. 258, §§ 2, 9 (2008).
Minnesota	Minn. Stat. §§ 375A.10, 466.07 (2007).
Mississippi	Miss. Code Ann. § 11-46-7 (2008).
Missouri	Mo. Rev. Stat. § 105.711 (2008).
Montana	Mont. Code. Ann. § 2-9-305 (2007).

Nebraska	Neb. Rev. Stat. §§ 41.0339, 41.0349, 81-8,239.05 (2007).
New Hampshire	N.H. Rev. Stat. Ann. § 99-D:2 (2008).
New Jersey	N.J. Stat. Ann. §§ 59:10-1, 59:10A-1 (West 2008).
New Mexico	N.M. Stat. Ann. §§ 41-4-23, 41-4-25 (Michie 2008).
New York	N.Y. Pub. Off. Law § 17 (McKinney 2008).
North Dakota	N.D. Cent. Code § 32-12.2-03 (2008).
Ohio	Ohio. Rev. Code. Ann. §§ 9.87, 109.361 (Anderson 2008).
Oklahoma	Okla. Stat. tit. 51, § 162 (2007).
Oregon	Or. Rev. Stat. § 30.285 (2007).
Pennsylvania	42 Pa. Cons. Stat. §§ 8525, 8547, 8548 (2007).
South Carolina	S.C. Code Ann. §§ 15-78-20, 1-7-50 (Law. Co-op. 2007).
Texas	Tex. Civ. Prac. & Rem. Code Ann. §§ 104.002, 104.004 (Vernon 2007).
Utah	Utah Code. Ann. §§ 67-5-1, 63-30d-902, 63-30d-904 (2008).
Vermont	Vt. Stat. Ann. tit. 12, § 5606 (2007); tit. 3, § 1101.
Washington	Wash. Rev. Code Ann. §§ 4.92.060, 4.92.070, 4.92.075 (West 2008).
West Virginia	W. Va. Code §§ 5-3-1, 29-12A-11 (2007).
Wisconsin	Wis. Stat. § 895.46 (2007).
Wyoming	Wyo. Stat. Ann. § 1-39-104 (Michie 2007).

Some States only require indemnification of their officials for official actions.

Florida	Fla. Stat. Ann. § 768.28 (West 2008).
Kansas	Kan. Stat. Ann. § 75-6103 (2006).
North Carolina	N.C. Gen. Stat. §§ 143-300.6, 143-300.3 (defense optional).

Others only require that the States at least defend their state officials.

Indiana	Ind. Code Ann. § 4-6-2-1.5 (Michie 2008).
Iowa	Iowa Code § 13.2 (2008).
Rhode Island	R.I. Gen. Laws §§ 9-31-8, 9-31-12 (2008) (indemnification optional).

Two States require that the States bear the costs related to insurance or self-insurance of state official liabilities.

Alabama	Ala. Code § 36-1-6-1 (2007).
Arizona	Ariz. Rev. Stat. § 41-621 (2007).

Only a few actually may opt not to provide liability insurance to or indemnity or defense of their state officials.

Georgia	Ga. Code Ann. § 20-2-991 (2007).
Hawaii	Haw. Rev. Stat. §§ 46-71.5, 662-16 (2008).
Michigan	Mich. Comp. Laws Ann. § 691.1408 (West 2008).
South Dakota	S.D. Codified Laws § 3-19-1 (Michie 2008).
Tennessee	Tenn. Code. Ann. §§ 8-42-103, 29-20-310 (2008).
Virginia	Va. Code Ann. § 2.2-2817 (Michie 2008).